

Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity

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DEMOCRACY AND INCLUSION: RECONCEPTUALIZING THE ROLE OF THE JUDGE IN A PLURALIST POLITY

SYLVIA R. LAZOS VARGAS*

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INTRODUCTION

The Supreme Court plays a critical role in resolving clashes between majority¹ and minority² interests and perspectives. The Equal

1. This Article defines a "majority" as a social group that experiences social life from a position of privilege, "normal" status, or dominance relative to other groups. For example, Whites, men, heterosexuals, and Euro-ethnics are "majorities" under this definition. A "majority" does not necessarily contain more than half of the members of the society. According to this model, there is no single "majority," since the meaning of this term will vary depending on the social context. This term does not imply that all members of any particular majority group share the same perspective. While members of particular groups may tend to share certain views based on their common experiences, there is often a great deal of variation within a group. Also, all of us belong to multiple groups, some of which may

Protection Clause, and at times the Due Process Clause,³ have become key vehicles for considering the most problematic intergroup conflicts that divide our society. In the last four terms, the Court has heard cases dealing with affirmative action in government procurement programs,⁴ legislative districts designed to increase minority representation,⁵ state sponsored male-only military schooling,⁶ and a state constitutional amendment that would have proscribed antidiscrimination legislation protecting gay men and lesbians.⁷ While the Court has declined to challenge California's anti-affirmative action referendum (Proposition 209)⁸ and Arizona's English-only state constitutional amendment,⁹ these unresolved disputes remain areas of likely future conflict. The Court's ability to resolve such majority-minority disputes in a manner that furthers democratic values is key to our polity's ability to be inclusive and equitable as it becomes increasingly diverse.

be "majority" and others which may be "minority." Such is the case, for example, of African American males. Our identities are shifting, multilayered, and complex. See *infra* Part II for further discussion of these concepts.

2. This Article defines a "minority" as a social group that, having been constructed by society as different, experiences a relatively subordinate social identity and social status, which often results in fewer opportunities for economic and social advancement. It is usually true, but not essential, that a "minority" group is comprised of fewer than half of the members of the population. As noted, members of minority groups do not necessarily share identical views, and all of us belong to multiple and shifting majority-minority groups. See *infra* Part II.

3. The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

4. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

5. *Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997); *Abrams v. Johnson*, 117 S. Ct. 1925 (1997); *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*).

6. *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*).

7. *Romer v. Evans*, 517 U.S. 620 (1996).

8. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir.) (upholding Proposition 209 as constitutional), *cert. denied*, 118 S. Ct. 397 (1997).

9. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997) (postponing adjudication of federal constitutional questions until the Arizona Supreme Court ruled definitively on the construction of the amendment). The Arizona Supreme Court resolved this issue in *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), holding that the English-only amendment violated the First Amendment and the Equal Protection Clause.

This Article argues, however, that the approach the Supreme Court has taken in resolving majority-minority disputes is inconsistent with the proper role of the Court in a pluralist democracy¹⁰ and therefore threatens both the legitimacy of the Court and the ability of our polity to resolve these important issues. The Court's privileging of majority views over those of the minority (or the "other") is critical, not so much because it causes the Court to reach the "wrong" result in key battleground civil rights cases, nor even because the Court has adopted the "wrong" view of the world, but instead because the Court has failed to recognize the multitude of views and perspectives that exist in our society. This Article faults the Court not so much for its selection of the majority perspective, but for its failure even to recognize that it has made a choice and for its failure to attempt to reason with the alternative point of view.¹¹

This Article proposes an alternative adjudicative approach that integrates "outsider" insights of majority-minority differences into an interpretive framework grounded in a pluralist model of democracy. The proposed "relational framework"¹² resolves these problematic cases by emphasizing pluralist democratic values of inclusiveness and

10. The terms "pluralist" and "democracy" have varying meanings. By "pluralist," this Article refers to what it claims as a social fact, that American society is made up of different majorities and minorities whose perspectives and values will likely differ because of their differing social experiences. See *infra* Part II. By "democracy," this Article means the form of self-government that includes both majorities and minorities, in which all participate in formulating the polity's values. This model of democracy, in the context of a constitutional democratic regime, means that the formulation of constitutional values should be inclusive of the perspectives of both majorities and minorities. See *infra* Part IV. Thus, as applied in this Article, "pluralist" is descriptive because it describes American society demographically, while "democracy" is normative because it sets as a guideline the ideals of coparticipation and inclusion.

11. This Article therefore also criticizes the Court when, on rare occasions, it adopts a minority perspective and fails fully to address the alternative majority epistemology. See *infra* Part V.B (discussing gender stereotype cases).

12. Professor Minow's and Professor MacNeil's relational approaches, the former in the context of difference theory, the latter in contract theory, have been helpful in developing the ideas presented in this Article. See generally *infra* Part IV.

See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 379 (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE]; Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 33 n.12 (1987) [hereinafter Minow, *Justice Engendered*] (describing her own work as the "social-relations approach"). Professor Minow explains that the relational approach:

emphasize[s] the basic connectedness between people and the injuries that result from social isolation and exclusion. The relational focus also assists an understanding of difference as a function of comparisons between people . . . [and] rejects distinctions drawn between people which express or confirm the distribution of power in ways that harm the less powerful.

MINOW, MAKING ALL THE DIFFERENCE, *supra*, at 379.

participatory coequality in determining the constitutional values of the polity. This model requires the Court both to recognize and to engage the majorities and minorities that will be most affected by the Court's decision. The model also calls upon the Court to structure its decisions narrowly, so as to allow citizens to work out their own resolution to moral, political, and epistemological disputes¹³ to the greatest extent possible.¹⁴

From time to time, it becomes obvious that we are a society of many perspectives, at times sharply at odds with each other. For example, the current attack on affirmative action programs reveals a deep racial divide. Most Whites, but not all, oppose affirmative action as a policy of group quotas or preferences.¹⁵ Most racial minorities, but not all, support affirmative action as a way to combat institutional and unconscious racial discrimination.¹⁶ On the gender front, the media has helped to popularize the notion that men and women communicate and perceive differently, and that men and women have dis-

Like Professor Minow's work, this project begins from the proposition that difference is "socially constructed," and that this social text is the proper framework for analyzing majority-minority conflict in constitutional case law.

Professor MacNeil's theoretical work on relational contract norms also employs the relational interpretive approach. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 10-35, 70 (1980) (arguing that contract law should acknowledge that commercial relationships are relational rather than discrete, and that contractual relations involve "such broad norms as distributive justice, liberty, human dignity, social equality and inequality, and procedural justice").

13. This Article uses the term "epistemology" to describe the conflicts in perspective between majorities and minorities that are reflected in constitutional law. This Article claims that minorities and majorities, because of their differing social experiences, will view the social phenomena that divide them, which in most cases will be the experience of discrimination, very differently.

14. This Article argues, nonetheless, that the Court must continue to issue decisions that protect minorities' rights so as to permit them to continue to participate in these discussions. See *infra* Part IV.C.2.a.

15. See *Affirmative Action: Republicans Praising Supreme Court's Ruling*, ATLANTA J. CONST., June 13, 1995, available in 1995 WL 6529562 (reporting that close to 80% of Whites expressed the view that "qualified minorities should not receive preference over equally qualified whites"); see also DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 215 (1995) (arguing that affirmative action is equivalent to group quotas); Daniel Yankelovich, *How Changes in the Economy Are Reshaping American Values*, in *VALUES AND PUBLIC POLICY* 16, 29-33 (Henry J. Aaron et al. eds., 1994) (advocating that because Americans value individualism and meritocracy highly, policy makers should reconsider affirmative action policies).

16. See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 147-69 (1997) (examining poll data on affirmative action programs); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 953 (1996) (describing a "broad-based assault on affirmative action").

tinct values and different orientations toward problem solving.¹⁷ For cultural conservatives, gay and lesbian "coming out" marches capture society's declining moral values, while for gay men and lesbians themselves, participation in such marches constitutes an important act of self and collective affirmation.

The O.J. Simpson verdict continues to be a palpable testament to the wide gulf between African Americans' and White Americans' faith in the fairness of the criminal justice system and to their contrasting views as to the shape and contours of racism. A majority of Whites consider Mr. Simpson guilty of the crime, while a majority of African Americans consider him innocent.¹⁸ One interpretation of this startling cultural event is that it reflects an epistemological divide. Whites and African Americans can live in the same country and yet their divergent social experiences cause Whites and racial minorities to interpret the same set of facts in radically different and irreconcilable ways.¹⁹

Such conflicts appear to depict a polity hopelessly divided, at odds with itself, and intolerant of the diversity that exists within it. At a superficial level, Americans appreciate their cultural diversity. At a deeper level, however, they are uneasy that important differences between majorities and minorities do not appear reconcilable. Recent poll data reflect that two-thirds of all Americans describe race rela-

17. See, e.g., JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* 59-91 (1992) (teaching couples how to communicate better in light of gender differences); Malcolm Gladwell, *Listening to Khakis: What America's Most Popular Pants Tell Us About the Way Guys Think*, THE NEW YORKER, July 28, 1997, at 54 (discussing how Levi Strauss & Co. marketed its Dockers collection by focusing on the way men talk to each other); Deborah Tannen, *How to Give Orders Like a Man*, N.Y. TIMES, Aug. 28, 1994 (Magazine), at 46 (challenging the assumption that talking in an indirect way, which is characteristic of women's mode of communication, reveals character flaws). See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (analyzing through psychological research and literary texts the different modes in which men and women describe the relationship between self and other).

18. African Americans were far more likely than Whites to believe the defendant's claim that the Los Angeles police department had conspired to "frame" Mr. Simpson. Whites also became distrustful of African American's views of justice when the criminal trial in which jurors were predominantly African American resulted in a verdict of not guilty. See Maria Puente, *Poll: Blacks' Confidence in Police Plummet*, U.S.A. TODAY, Mar. 21, 1995, available in 1995 WL 2929771 (citing a poll that African Americans' confidence in police and the justice system has "dropped significantly in the past two years"); David K. Shipler, *Living Under Suspicion*, N.Y. TIMES, Feb. 7, 1997, at A2 (citing polls that show three-quarters of African Americans agree with the "not guilty" criminal verdict in the Simpson case, compared with only one-third of Whites, while three-quarters of Whites agree with the liability found in the civil trial, compared with less than one-third of Blacks).

19. See *infra* notes 184-196 and accompanying text (discussing the distinct "social spaces" experienced by majorities and minorities as the foundation for distinct epistemologies).

tions as “not so good” or “poor.”²⁰ In a pluralist democracy, both majorities and minorities must be able to understand the sources of majority-minority conflict, so that they can come to tolerate these conflicts as reasonable disagreements.

Part I of this Article shows that the Court’s decisions in key intergroup conflict cases dealing with civil rights often involve, at an epistemological level not always clearly articulated in case law, a contest of social texts. Majorities and minorities variously describe and account for the social phenomena of discrimination, stereotypes, and privilege that divide them. Specifically, Part I.A examines the paradigmatic majority-minority divide—racial discrimination—and focuses on the Court’s opinions in two early cases: *Washington v. Davis*²¹ and *Keyes v. School District No. 1*.²² This analysis shows that the Court has constructed racial discrimination, based on Whites’ experience of this social dynamic, as a conscious, casuistic, individualistic, culpable, and solvable phenomenon. Yet, racial minorities *experience* and know racial discrimination to be an unconscious, diffuse, systemic, and negligent phenomenon. Part I.B revisits the key sexual orientation case, *Bowers v. Hardwick*,²³ which remains good law after *Romer v. Evans*.²⁴ In *Bowers*, the Court accepted and legitimized the culturally conservative majority’s moral and religious perspective that same-sex relations are deviant.²⁵

Part II draws on work done by social scientists, feminists, and race theorists to explain why majorities and minorities develop distinct epistemologies. It argues, in brief, that these differences result from the fact that majority and minority groups occupy different social space, and that their knowledge, similarly, is “socially positioned.” Therefore, as long as we can foresee that minorities’ social experience will be significantly different from majorities’, the law should take into account that majorities and minorities will continue to have different ways of knowing.

Part III addresses the question of how judges are able to privilege one epistemological framework over others. Incorporating the work of legal realists, critical legal theorists, and critical race studies, it maps

20. See *ABC News/ESPN poll*, Apr. 4, 1997, available in WESTLAW, POLL File (reporting a telephone survey of 609 respondents conducted between Feb. 21 and Feb. 24, 1997, in which 2% reported race relations in the United States are excellent, 30% good, 45% not so good, and 21% poor).

21. 426 U.S. 229 (1976); see *infra* notes 78-100 and accompanying text.

22. 413 U.S. 189 (1973); see *infra* notes 51-77, 92-100 and accompanying text.

23. 478 U.S. 186 (1986); see *infra* notes 138-171 and accompanying text.

24. 517 U.S. 620 (1996); see *infra* notes 426-473 and accompanying text.

25. *Bowers*, 478 U.S. at 191-94, 195-96.

how epistemological privileging can remain unarticulated and largely invisible, even to judges who are well-meaning and concerned about social division. Because judges, like the rest of us, are shaped by cultural ideology, their "common sense" of the social world will be drawn from their own social position. Moreover, their reliance on a legal method that emphasizes abstraction and doctrinal construction permits judges to insert the relevant social text. In addition, our method of constitutional adjudication presupposes "win-loss" thinking, a mode of reasoning and conflict resolution that discourages reflection about how epistemological issues divide majorities and minorities.

Part IV sets out an interpretive "relational framework" that reaffirms the foundational values of democracy. It focuses on the pluralist model of democracy developed in John Rawls's *Political Liberalism* and elaborated by other political scientists.²⁶ Part IV.A argues that the democratic foundational principles of coequal participation and inclusion should lead judges to engage both majority and minority epis-

26. See JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996) [hereinafter RAWLS, *LIBERALISM*]. Rawls's model incorporates a civic ethic of coequality, coparticipation, and reciprocity; see also BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117 (1984) (describing strong democracy as participatory democracy that forms a self-governing community of citizens "who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions"); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 2 (1996) (setting forth "reciprocity"—reasoning beyond one's self-interest in order to address those who reasonably disagree—as a principle of deliberative democracy); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 78, 102 (paperback reprint 1990) (elaborating the concepts of reciprocity, public justification, and overlapping consensus).

Rawls's pluralist model of democracy does not share some of the weaknesses of other models of communicative democracy that emphasize deliberation and individual transformation, such as civic republicanism. See *infra* Part IV (elaborating on the pluralist model). In contrast to Rawls's pluralist model, civic republicans see individual transformation and the formulation of unified values and goals as an eventual outcome of the process of civic deliberation. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (advocating republican constitutionalism as an effort to make "political communities sources of contestable value and self-direction"); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992) (examining how interest groups engaged in civic deliberation form and inform administrative processes); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) (stating that civic republicanism is based on the belief that the process of deliberation can help reconcile disparate conceptions of the public good through discussion and dialogue). But see Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610 (1988) (analyzing why "black Americans may struggle to find reasons to allay their skepticism" with the revival of republicanism); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 803 (1993) (criticizing civic republicanism because it requires the abandonment of many protections of civil liberties); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1721 (1988) (criticizing civic republicanism for "recast[ing] private associations as participants in a common public life . . . [so as] to mute their potential deviance from and opposition to dominant norms").

temologies in intergroup conflict cases. Part IV.B then uses Rawls's concepts of "reciprocity" and "overlapping consensus" to describe a reconstructed model of public reason that would assist judges to resolve majority-minority conflict cases. Part IV.C discusses the relationship between the Court's role in adjudicating majority-minority conflict cases, and the role played by the rest of the polity in resolving such disputes. It argues that it is critical for the Court to facilitate majority-minority discourse throughout the polity by setting parameters for the polity's discussions, by providing an example of what a judge's public reason ought to mean, and also by not cutting off discussion that ought to take place in the polity at large.

Part V applies the relational framework to three significant and recent sets of majority-minority cases: the Court's approach to homosexuality in *Romer v. Evans*;²⁷ its handling of gender disparities in *Mississippi University for Women v. Hogan*²⁸ and *United States v. Virginia (VMI)*;²⁹ and its explication of race issues in *Adarand Constructors, Inc. v. Peña*³⁰ and *City of Richmond v. J.A. Croson Co.*³¹ This Part finds both cause for hope and much room for improvement in these decisions. On the positive side, it argues that the Court's decisions in the sexual orientation and gender cases demonstrate that it has the capacity to deal with the complexities of majority-minority dynamics and even to engage the epistemology of "the other." This Part contends that *Adarand* has some positive aspects, because it calls upon state actors to make narrow, reasoned decisions in the difficult affirmative action area. On the other hand, Part V also argues that the Court must work much harder at not only understanding and engaging the epistemology of "the other," but also in limiting its intrusions into the political sphere.

Part VI, finally, argues that the relational model is not necessarily inconsistent with the "color-blind" approach urged by the Court in its recent affirmative action and voting rights decisions. It contends that, while tension exists between these approaches, the Court would not need to abandon its "color-blind" analysis to adopt the concept of judging urged in this Article.

This Article concludes that majority-minority conflict is in urgent need of care by judges, and that judges, women and men of good faith, can meet the demands of this difficult task. However, there is

27. 517 U.S. 620 (1996).

28. 458 U.S. 718 (1982).

29. 518 U.S. 515 (1996).

30. 515 U.S. 200 (1995).

31. 488 U.S. 469 (1989).

also cause for concern. In order for judges to succeed in this pluralistic endeavor they must possess a judicial temperament, a commitment to neutrality, openness of intellect, and a belief in moderation. Thus, the current push among some sectors of this society to select judges on the basis of ideological litmus tests undercuts what is attitudinally necessary to face the modern challenge: the connection of unlikes as coequals.

I. MAJORITY-MINORITY CONFLICT CASES: THE PROBLEM OF EPISTEMOLOGICAL PRIVILEGING

Race, gender, sexual orientation, and cultural identity discrimination cases are often vehicles for claims made by minority groups that their treatment in society is not what it should be. In these cases, majority and minority epistemologies collide. In gender discrimination cases, for example, the collision is caused by disagreement as to whether social norms that construct women's "normal" preferences, "natural" physical capabilities, or "traditional" roles oppress women's liberty, reduce economic opportunities, and relegate them to a subordinate social identity.³² In cultural identity cases, the epistemological collision is caused by the assumption that homogeneity—in-

32. The epistemological conflict in gender cases is determined by the significance of the construction of gender as it impacts on women's equality of opportunity. See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (finding that Title VII did not override a California statute requiring employers to pay women pregnancy disability leave); *Gelduldig v. Aiello*, 417 U.S. 484, 494 (1974) (holding that California's unemployment insurance that excluded pregnancy from covered workers' benefits for "disability" was not sex-based discrimination); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872) (rejecting a challenge to Illinois's proscription of women from entry into the legal profession on the ground that the Privileges and Immunities Clause did not cover such rights of citizenship); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (holding that an Indianapolis ordinance that banned commerce in pornographic material on the basis that such acts discriminate against women violated the First Amendment because the state may not "ordain preferred viewpoints . . . and silence opponents"), *aff'd*, 475 U.S. 1001 (1986). For examples of commentary on these issues, see BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* xliii (2d ed. 1996) (exploring the ways that law and society have caused discrimination against women, and possible legal remedies); RUTH COLKER, *PREGNANT MEN: PRACTICE, THEORY, AND THE LAW* xi (1994) (tackling "two issues that are central to many versions of modern feminist theory—the anti-essentialism critique and equality theory"); CATHERINE MACKINNON, *ONLY WORDS* 91-98 (1994) (discussing the conflict between the law of equality and the law of free speech in the context of pornography and specifically the decision in *American Booksellers*); Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 47 (1997) (looking at "how a feminist account of state power can comprehend women as public actors and as subjects of governmental significance").

stead of diversity—is the norm that the law should maintain. This conflict is most visible in the language cases.³³

A. Race-Based Epistemologies and Antidiscrimination Doctrine

*Brown v. Board of Education*³⁴ is the key case that shapes our thinking of constitutional adjudication of minority-majority antidiscrimination issues.³⁵ How broadly or narrowly *Brown* should be interpreted has been and continues to be contested. One version interprets *Brown* narrowly. From the antidiscrimination perspective,³⁶ *Brown* stands for

33. In the case of Spanish-speaking Latinos, the issue is whether the majority can target Spanish speakers or otherwise resist the intrusion of Spanish into the public sphere. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (plurality opinion) (concluding that the prosecutor's dismissal of jurors from a petit jury because of bilingualism and other traits associated with Latino ethnicity was not discriminatory under the Equal Protection Clause); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 929 (9th Cir. 1995) (en banc) (holding that a state constitutional amendment that mandated that this "State and all political subdivisions of this State shall act in English and in no other language" was overbroad and thus violated the First Amendment), *vacated sub nom.* *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) (holding that, while an English-only rule in the workplace can exacerbate existing tensions, it "does not inexorably lead to an abusive environment for those whose primary language is not English"); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (holding that Title VII does not protect people's ability to express their cultural heritage by speaking their native tongue), *aff'd*, 86 F.3d 1151 (4th Cir. 1996). For commentary, see Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1355 (1997) (examining "the manner in which litigants and judges discuss English-only rules"); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 279 (1992) (reviewing the "legal history documenting the interaction between the dominant culture and other American cultures with respect to language"). See generally Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1495 (1998) (explaining "the cultural ideology that has made homogeneity an unexpressed assumption and mandate in law").

34. 347 U.S. 483 (1954).

35. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 18 (1996) (stating that "for some people, any general theory about the constitution must fail if it entails the incorrectness of *Brown*").

36. The antidiscrimination principle, which constitutional scholars locate as originating in a line of cases including *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Korematsu v. United States*, 323 U.S. 214 (1944), and ultimately *Brown v. Board of Education*, 347 U.S. 483 (1954), stands for the proposition that the Constitution proscribes classification and other decisions on the basis of race. See *Korematsu*, 323 U.S. at 216 (holding that classifications that target disfavored groups are "suspect," but that the detainment of Japanese Americans during World War II survived an equal protection challenge for reasons of national security); *Yick Wo*, 118 U.S. at 373-74 (holding that a neutral housing ordinance violated the Fourteenth Amendment because it was applied only to deny laundry permits to Chinese individuals); see also Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (defining the antidiscrimination

the proposition that the use of racial classifications by State government in segregating African American children in public schools is presumptively suspect and cannot be justified by a compelling state interest.³⁷ This interpretation supports the Court's current "color-blind" interpretation of the Equal Protection Clause, according to which any official color conscious decision making, whether benign or discriminatory, should be subject to strict scrutiny.³⁸ From a broader perspective, however, which commentators have alternatively described as "antibsubordination,"³⁹ "antisubjugation,"⁴⁰ "anti-caste,"⁴¹ or "substantive equality,"⁴² the *Brown* Court held that what was formerly

principle as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected").

37. *Brown*, 347 U.S. at 495 (concluding that "in the field of public education the doctrine of 'separate but equal' has no place").

38. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-38 (1995) (holding that strict scrutiny applies to color-conscious remedies such as affirmative action).

39. This interpretation of the Equal Protection Clause looks at the dynamics between social groups and pushes beyond the claim of an individual litigant. *See Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004 (1986) (discussing "the premise that equal protection doctrine needs to do a better job understanding blacks' and women's visions of equality and needs to have a framework that more effectively deals with the affirmative action cases"); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 123-24 (1976) (arguing that the Equal Protection Clause affords some recognition both of the role of social groups and the hierarchy among them, and asserting that an individualized concept of antidiscrimination is overly narrow); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 48 (1977) (suggesting that "[t]he chief target of the equal citizenship principle is the stigma of caste").

40. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1515 (2d ed. 1988) (describing the antisubjugation principle as one that "aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens").

41. *See* Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 3 (1983) (arguing that, at the core of the Equal Protection Clause, there is an anti-caste principle according to which "each person has the right to be free from the continuing effects of caste discrimination in the laws, programs, official decisions, government, and community affairs of these United States"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987) (arguing that because "separate incidents of racial stigmatization do not inflict isolated injuries but are part of a . . . pervasive pattern of stigmatizing actions that cumulate to compose an injurious whole"); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2413-14, 2440 (1994) (arguing that the anti-caste principle encompasses a narrower band of minorities, excluding gay men and lesbians, but extending to African Americans and women, and that eliminating caste-like relations—including economic structural disadvantage—is primarily a task for the government's political branches).

42. *See, e.g.,* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989) (describing the Equal Protection Clause as embodying the principle of "equal citizenship" that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member"); Fiss, *supra*

considered "separate but equal" was per se unequal because official state segregation inflicts stigmatic harms upon African American children that reinforce structural and unconscious discrimination.⁴³ This interpretation connects the state's discriminatory acts (official segregation) to maintaining stigmatization of the social identity of a disfavored minority (African American children). In a controversial passage, the Court asserted that: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁴⁴

The Court unflinchingly followed a broad vision of *Brown* for almost two decades. The Court expanded *Brown*'s broad integration remedy in cases like *Green v. County School Board*⁴⁵ and *Swann v. Charlotte-Mecklenburg Board of Education*.⁴⁶ *McLaughlin v. Florida*⁴⁷ and *Loving v. Virginia*⁴⁸ expanded the constitutional meaning of *Brown* and required the state to meet a "very heavy burden"⁴⁹ when it singled out racial minorities for treatment that was permissible when engaged in by Whites but not racial minorities.⁵⁰

note 39, at 147-51 (suggesting a "group-disadvantaging principle" that includes a redistributive strategy as well as an "ethical view against caste"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1062 (1978) (emphasizing that substantive equal protection focuses "on ends and purposes, and not just means or legislative rationality"); see also Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1734 (1989) (arguing that the constitutionality of affirmative action cannot be evaluated "without (at least implicitly) subscribing to a particular conception of substantive equality").

43. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954) (discussing the broader, psychological effects of segregation on minority children).

44. *Id.* at 494. Justice Thomas, among others, has recently repudiated this passage, stating that "[p]sychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause." *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

45. 391 U.S. 430, 437-38 (1968) (holding that school boards have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

46. 402 U.S. 1, 26 (1971) (sanctioning the far-reaching busing remedy involving elementary as well as secondary schools in order "to achieve the greatest possible degree of actual desegregation").

47. 379 U.S. 184, 184-86 (1964) (striking down a Florida statute that levied heavier penalties on interracial versus same race cohabitation).

48. 388 U.S. 1, 2 (1967) (striking down laws prohibiting interracial marriage).

49. *Id.* at 9.

50. *Id.* at 11 (striking down a miscegenation statute because it "rest[s] solely upon distinctions drawn according to race"); see *McLaughlin*, 379 U.S. at 188 (striking down a statute prohibiting interracial cohabitation because it "treats the interracial couple . . . differently than it does any other couple").

*Keyes v. School District No. 1*⁵¹ was the first case to sharply limit the reach of *Brown*. The Court did so by reconstructing and narrowing what discrimination had meant under *Brown*. In *Keyes*, the issue posed was whether the Denver School District, which had no prior history of de jure segregation but was de facto segregated, could be obligated to undertake remedial actions under *Brown*.⁵² The trial record had established that the non-White schools were "educationally inferior," receiving fewer resources, including less well-trained personnel, while the predominantly White schools fared far better.⁵³ The school district maintained that such de facto racial segregation had been the result of neutral decision-making criteria, particularly the school board's policy of favoring local neighborhood schools.⁵⁴

The *Keyes* Court held that, in de facto segregation cases, plaintiffs needed to show that the school district had had "segregative intent."⁵⁵ Under the facts of *Keyes*, the Court was willing to infer intent because there had been a crucial lower court finding that district officials had intentionally maintained segregated core city schools.⁵⁶ The Court ruled that this intent could be ascribed to the rest of the district; however, the Board could rebut such a presumption.⁵⁷

The introduction in *Keyes* of the requirement of discriminatory intent is pivotal. The Court introduced the concept of discriminatory intent because Denver school board officials never had enunciated a policy of maintaining racial segregation.⁵⁸ Thus, in *Keyes*, the Court addressed the appropriate burden of proof absent de jure segregation. While the Court acknowledged that de facto segregation was different from de jure segregation, it failed to recognize the impact of the heightened burden of proof required to show segregative intent. The circumstantial proof offered in *Keyes* of a "systematic program of

51. 413 U.S. 189 (1973).

52. *Id.* at 191-202 (noting that the northwest corner of the Denver school district was almost entirely White, while the southwest corner was almost entirely Latino and African American). Professor Rachel Moran offers a sociological analysis of the *Keyes* litigation. See Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 153 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

53. *Keyes*, 413 U.S. at 193.

54. *Id.* at 205-07.

55. *Id.* at 193, 197-98. The Court applied a shifting burden approach, so that once plaintiffs were able to show segregative intent within a significant segment of the school system, there was a presumption of such intent district-wide, and the school authorities then had the burden of showing that their other actions were not similarly motivated. *Id.* at 207-08.

56. *Id.*

57. *Id.* at 208-09.

58. *Id.* at 191.

segregation affecting a substantial portion of students, schools, teachers, and facilities”⁵⁹ has proven difficult for subsequent plaintiffs to duplicate.⁶⁰

The *Keyes* Court failed to acknowledge that the pragmatic effect of its ruling was to narrow prior interpretations of *Brown*. The main body of the opinion authored by Justice Brennan is workmanlike, discussing at great length burdens of proof, without intimating what their impact would be on race relations litigation.⁶¹ Justice Powell’s concurrence,⁶² however, deals in a more straightforward manner with the problems of imposing proof of intent in cases of the more common phenomenon of de facto segregation. Justice Powell candidly stated that most school districts are de facto segregated,⁶³ and that “there is . . . not a school district . . . with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some measure to the degree of segregation which still prevails.”⁶⁴ He observed that the search for proof of segregative intent will subject future courts to “murky, subjective judgments,”⁶⁵ that will tender “fortuitous, unpredictable and even capricious”⁶⁶ results.

Justice Powell’s concurrence also addressed the appropriate extent of desegregation remedies. He advocated for “reason, flexibility, and balance.”⁶⁷ Powell appeared solicitous of both African American and White parents’ interests when he listed the parade of horrors that busing remedies under *Brown* could trigger: widespread busing that “risk[s] setting in motion unpredictable and unmanageable social consequences”;⁶⁸ the specter of overzealous potential plaintiffs meddling in local school board decisions;⁶⁹ and the eventual “dismantling” of public school systems.⁷⁰

59. *Id.* at 201.

60. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 561 n.18 (3d ed. 1992) (“*Keyes*’ requirement that plaintiffs in districts with no history of de jure segregation prove that the school board intentionally segregated students has proved to be a formidable burden . . .”).

61. *Keyes*, 413 U.S. at 200, 207-13.

62. *Id.* at 217-53 (Powell, J., concurring in part and dissenting in part).

63. *Id.* at 218, 232, 252-53.

64. *Id.* at 252-53.

65. *Id.* at 227.

66. *Id.* at 233.

67. *Id.* at 239.

68. *Id.* at 250.

69. *Id.* at 233-35.

70. *Id.* at 250.

Justice Powell's parade of horrors, however, is not as neutral as it may appear, even if it is prescient. Powell's concerns strike themes that reflect White parents' views on busing. Powell cites parents' private interests in guiding their children's education.⁷¹ This privacy-based right would become a mantra in White parents' subsequent defiance of court ordered busing.⁷² His concern that parents might be unable to afford private education⁷³ would become very real for White parents who would choose to resist busing en masse by opting out of the public school system.⁷⁴ His concern that busing could weaken local community influence on school boards⁷⁵ is a concern that African American parents were not in a position to feel, because they viewed litigation as the only effective means of having local school board officials take note of their interest.⁷⁶ More importantly, Powell does not acknowledge what was at the time African American parents' main reason for pursuing racial desegregation remedies. For these parents, integration, even if achieved at the cost of busing, seemed to offer a way to solve what they viewed as inferior educational opportunities for their children.⁷⁷

Washington v. Davis,⁷⁸ decided three terms later, solidified the *Keyes* Court's limitation of racial remedies in another area, employment discrimination, by imposing a similar burden on the plaintiff to show discriminatory intent.⁷⁹ *Davis* challenged the employment applicant screening tests used by the District of Columbia police; the rec-

71. *Id.* at 246-47, 251.

72. *See, e.g., Northcross v. Board of Educ.*, 466 F.2d 890, 898 (6th Cir. 1972) (Weick, J., dissenting) (urging that court ordered busing frustrates American couples' choice of neighborhood schools and infringes upon their privilege of association). *See generally* Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (discussing the limits of ideal remedies in the face of real opposition to desegregation).

73. *Keyes*, 413 U.S. at 247 (Powell, J., concurring in part and dissenting in part).

74. Professor Moran documents that at the time of the *Keyes* litigation, the Denver school district had a majority White student body. As of 1991, the school district had become 40% Latino and 20% African American. *See* Moran, *supra* note 52, at 155-56.

75. *Keyes*, 413 U.S. at 246 (Powell, J., concurring in part and dissenting in part).

76. *See* Moran, *supra* note 52, at 166.

77. *See id.* at 157-59. Professor Moran notes that the *Keyes* controversy was spearheaded by middle class African American parents who perceived that the school district's de facto segregative practices would block their children's advancement. The NAACP Legal Defense Fund initiated the litigation only after citywide elections succeeded in placing antibusing candidates in control of the school board. Latino parents were not initially part of the litigation because they were not as confident as African American parents that the integration remedy would result in improved educational opportunities.

78. 426 U.S. 229 (1976).

79. *Id.* at 241 (finding that the disparate racial impact of a police department's written personnel test was not unconstitutional absent a showing of "the necessary discriminatory racial purpose").

ord showed that the screening test had a disproportionate impact on African American applicants.⁸⁰ The prior decisions of *Griggs v. Duke Power Co.*⁸¹ and *Albemarle Paper Co. v. Moody*⁸² had established that, under Title VII, once the plaintiff had demonstrated a disproportionate racial impact, the employer had the burden of demonstrating the nexus between its employment screening devices and job qualifications.⁸³ *Davis* indicated that this shifting burden approach—according to which a showing of disparate racial impact was sufficient to make a prima facie case—was limited to Title VII, and that a challenge under the Equal Protection Clause required a showing of purpose or intent to discriminate.⁸⁴

To support its holding that the Equal Protection Clause requires more than a disparate racial impact, the *Davis* Court offered a reinterpretation of equal protection cases, including the recently decided *Keyes*, to support the claim that discriminatory intent had always been an important doctrinal requirement of a discrimination claim.⁸⁵ The Court cited *Strauder v. West Virginia*,⁸⁶ an early case that struck down West Virginia's categorical exclusion of African Americans from petit juries. The Court claimed that *Strauder* stands for the proposition that intent to discriminate can be shown by the categorical exclusion of a racial minority group; the Court contrasted such categorical exclusion to a racially disparate impact from which a discriminatory purpose may not necessarily be inferred.⁸⁷ *Strauder* is a curious choice because it better supports the proposition that the Court should be on guard

80. *Id.* at 235-36.

81. 401 U.S. 424 (1971).

82. 422 U.S. 405 (1975).

83. *Id.* at 425; *Griggs*, 401 U.S. at 432.

84. *Davis*, 426 U.S. at 239.

85. *Id.* at 239-45.

86. 100 U.S. 303, 310 (1880) (holding that a statute that rendered African Americans ineligible for jury service violated the Equal Protection Clause), *overruled on other grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975).

87. *Davis*, 426 U.S. at 239 ("A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the prescribed race" (quoting *Akins v. Texas*, 325 U.S. 398, 403-04 (1945))). *Strauder* placed the purpose of the Thirteenth and Fourteenth Amendments in their historical context, namely, "to protect an emancipated race." *Strauder*, 100 U.S. at 310. The *Strauder* Court continued:

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy[s]. . . . It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.

Id. at 306 (citing *The Slaughter-House Cases*, 83 U.S. 36 (1873)).

for actions by the majority to single out a disfavored minority based on a supremacist ideology⁸⁸ or, more generally, racial hostility.⁸⁹

A more candid justification as to why the disproportionate effect test must not be recognized in equal protection doctrine appears at the end of the *Davis* opinion. Citing a law review article, the Court contended that the *Griggs* disparate impact position would have "far reaching . . . consequences" in the way America conducts business.⁹⁰ The Court implied that virtually every aspect of states' decision making from welfare to taxes to bridge tolls could be subject to court intervention and modification under the disparate impact rule of *Griggs* and *Albemarle*.⁹¹

Davis and *Keyes* can be understood as cases that bring the Court face to face with the immensity of the racial inequality problem. The Court had to address the following sorts of issues: the extent to which remedying racial problems might tax judicial resources, particularly judicial institutional credibility with the majority White population;⁹² the discomfort to Whites of continuing the trajectory of earlier case law that attempted to address race discrimination more systemically;⁹³ and the pervasiveness of biased practices that the *Brown* Court was willing to contemplate originated with *Plessy*.⁹⁴ Although the Court accepted the premise that a disparate impact test would have unacceptably far-reaching consequences,⁹⁵ it failed to provide a justifi-

88. See *Strauder*, 100 U.S. at 306 (describing as the purpose of the Civil War Amendments the anticipation that "those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed").

89. *Id.* ("Discriminations against [African Americans] had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected.").

90. *Davis*, 426 U.S. at 248 & n.14 (citing Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972)).

91. Specifically, the Court said:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification . . . would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248.

92. *Id.* at 248 & n.14; *Keyes*, 413 U.S. at 250-52 (Powell, J., concurring in part and dissenting in part).

93. *Davis*, 426 U.S. at 242-45; *Keyes*, 413 U.S. at 251 (Powell, J., concurring in part and dissenting in part).

94. *Davis*, 426 U.S. at 246; *Keyes*, 413 U.S. at 252-53 (Powell, J., concurring in part and dissenting in part).

95. *Davis*, 426 U.S. at 248.

cation to racial minorities for why the Court should not recognize such a remedy. While the Court appeared to recognize the continuing and far-reaching impacts of discrimination on racial minorities, nevertheless the results of these cases indicate a belief that these solutions had already gone too far.⁹⁶

In *Keyes* and *Davis*, however, the Court failed to acknowledge the experience of racial minorities. The requirement of showing discriminatory intent⁹⁷ not only raises the burden of proof for claimants,⁹⁸ but more importantly, reshapes what the Constitution recognizes as discrimination. The Court did not articulate the social facts of the phenomenon of discrimination. But by doctrinally defining the intent element as conscious, casuistic, individualist, and culpable, the Court required plaintiffs to prove what *Whites* view as discrimination.⁹⁹ By contrast, the antistatutory prong of *Brown* interpreted discrimination as a broad systemic practice, a social text concordant with how racial minorities *experience* discrimination, as unconscious, diffuse, systemic, and negligent.¹⁰⁰ The Court in *Keyes* and *Davis* failed to reason and justify across the color line. Instead, these cases mark the beginning of an epistemological racial divide, which then became incorporated into equal protection jurisprudence.

1. *Conscious versus Unconscious Discrimination.*—As Professor Lawrence has argued, unconscious discrimination is insidious and more pervasive than conscious discrimination.¹⁰¹ According to psycholo-

96. See *supra* notes 62-77 and accompanying text (discussing the tension between the identification of racial injustice and the failure to provide a satisfactory remedy in Justice Powell's concurring opinion in *Keyes*). See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 130-50 (1992) (defending the Court's retreat from difficult racial matters).

97. *Davis*, 426 U.S. at 239; *Keyes*, 413 U.S. at 208.

98. See, e.g., *Keyes*, 413 U.S. at 261 (Rehnquist, J., dissenting) ("'[I]ntent' . . . is difficult enough to ascertain under the most favorable of circumstances. Far greater difficulty is encountered if we are to assess the intentions with which official acts of a school board are performed over a period of years." (citation omitted)). See generally BELL, *supra* note 60, at 834-75 (discussing the issue of discriminatory intent in the context of employment law); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1110-19 (1989) (describing the intent requirement in *Davis* and other cases as inconsistent with the process theory on which it is grounded).

99. See *Davis*, 426 U.S. at 240 (refusing to recognize de facto segregation as unlawful absent a purpose or intent to discriminate); *Keyes*, 413 U.S. at 202 (describing discrimination as a series of discrete acts with "racially identifiable bases").

100. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954) (describing the stigmatic harms of systematic segregation).

101. Lawrence, *supra* note 41, at 322 (arguing that "[t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional"); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination*

gists, unconscious racial discrimination can affect almost any interaction between Whites and racial minorities.¹⁰² Negative racial stereotypes can affect Whites' decision making in a myriad of areas, particularly areas where subjective judgments about character, motivation, and intellectual ability come into play.¹⁰³ A White decision maker need not be aware that she is making harsh judgments when the subjects are racial minorities rather than Whites.¹⁰⁴ These subjective judgments can be rationalized, which enables Whites to maintain an egalitarian self-image¹⁰⁵ and yet to continue to participate in unconscious discrimination, which, just as efficiently as the conscious variety, impedes the progress of racial minorities' access to equal opportunity. Substantial empirical data document the pervasiveness and frequency of racial discrimination in a variety of areas, including denial of credit, car purchases, and employment performance evaluations.¹⁰⁶

and *Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that Title VII jurisprudence is inadequate to address subtle, unconscious forms of bias); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1011 (1997) (providing a new conceptual framework to decide Title VII cases that includes "the historical legacy of slavery" and "the presence of invisible white privilege").

102. See David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 133 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (setting forth a cognitive perspective and defining a stereotype as "a cognitive structure that contains the perceiver's knowledge, beliefs, and expectancies about some human group" (emphasis omitted)).

103. *Id.* at 148-49 (noting that, because stereotypes may serve as a basis for hypotheses about individuals, they may influence subjective judgments).

104. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 102, at 61, 73-80. Gaertner and Dovidio devised several studies showing that Whites may discriminate against racial minorities and yet continue to believe themselves to be nonprejudiced and egalitarian. In one such study, high and low prejudiced (scored by an attitudinal test) White male college students rated African American and White individuals who were alternatively introduced as their subordinate or supervisor. *Id.* at 73-75. Both low and high prejudiced Whites negatively rated their Black supervisor. *Id.* at 75. Post-experimental evaluations revealed that they perceived the Black supervisors to be significantly less intelligent than themselves, although the test as devised imparted no information about the subjects' intelligence. *Id.* Gaertner and Dovidio concluded that "many whites, truly believing that they are nonprejudiced and nondiscriminating, may presently be participating in the continued restriction of opportunities for blacks and other minorities by opposing programs that threaten their own advantaged status and by misperceiving the relative competence of those who have traditionally occupied lower-status positions." *Id.* at 75-76.

105. *Id.* at 66-73 (concluding that White individuals will discriminate against Blacks in situations where the relevance of non-race-related elements are heightened because this context allows White individuals to rationalize a negative response).

106. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 139-41 (1993) (exploring the significance of the increasing class and residential isolation between Blacks and Whites); Margalynne Arm-

By removing from judicial scrutiny a great portion of those individual decisions that are motivated unconsciously by racial bias or indirectly have a discriminatory impact, the intent requirement arguably removes the possibility of judicial confrontation with Whites' own ingrained racial stereotypes, in-group preferencing behavior, and the effects of "neutral" decision making that nonetheless have a racial impact.¹⁰⁷ Because the Court has adopted a White perspective, the Court has truncated a necessary racial dialogue, which might proceed along the following lines: If racial stereotypes are so ingrained and so pervasive, is the judiciary the proper institution to take on the immense task of ferreting out unconscious discriminatory thoughts? How can subjecting Whites to the constant anxiety of being discovered as "unconscious" discriminators improve race relations? This discussion would not necessarily solve the problem of ongoing unconscious discrimination, which may require individual transformation. Such a discussion, however, would capture and bring to a conscious, public level the kinds of social interactions that harm racial minorities. By adopting the White perspective without discussion, the Court has foreclosed this possible dialogue.

2. *Intentional versus Negligent Discrimination.*—The intent requirement assumes a cause and effect relationship between the action (con-

strong, *Privilege in Residential Housing*, in STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 43-66 (1996) [hereinafter *PRIVILEGE REVEALED*] (discussing residential segregation and its effect as a racial privilege).

For a discussion of discrimination in the context of historical employment practices, see TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 13-14, 25-26, 72, 100-04 (1994) (describing how in the early 1900s racial attitudes, combined with a developing agricultural economy, resulted in a system of occupational and residential segregation in California, where Asian Americans, Native Americans, and Mexican Americans were relegated to agricultural labor, while Whites had access to skilled occupations); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 144-50 (1991) (discussing how in pre-Industrial America certain occupations remained off-limits to racial minorities, particularly African Americans).

For a discussion of discrimination in the context of the tax code, see Gwen Thayer Handelman, *Acknowledging Workers in Definitions of Consumption and Investment: The Case of Health Care Law*, in *TAXING AMERICA* 119, 138-41 (Karen B. Brown & Mary Louise Fellows eds., 1996) (arguing that current tax policy ignores and harms the working class); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 768 (raising the question of whether the IRS systematically favors Whites over Blacks); John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in *TAXING AMERICA*, *supra*, at 80, 83 (analyzing how the tax code has penalized African Americans and aided the White community "by subsidizing and reifying racial segregation and racial inequality in the distribution of resources").

107. See generally Lawrence, *supra* note 41, at 326 (discussing different theories of unconscious attitudes that ultimately result in racism).

duct motivated by discriminatory intent) and a result (discriminatory harm). As evidenced by the *Keyes* case, a series of individual, discrete, "neutral" decisions, when taken together, can result in a segregated and substantively unequal school district.¹⁰⁸ In favoring "neighborhood" choice policies, the Denver school officials could claim that there was no conscious intent to segregate. However, in *Keyes*, given segregated residential patterns, school officials were probably aware or should have been aware that such policies would tend to perpetuate school segregation and a status quo in which Whites had substantially better access to quality schools.¹⁰⁹ As Alan Freeman has noted, the causality requirement of the antidiscrimination doctrine does not capture the concept of "negligent discrimination," an intermediate range where Whites do not intend harm, but have some awareness of the effects of actions which are not entirely neutral, and which, therefore, will perpetuate a status quo advantageous to Whites.¹¹⁰

The intent requirement removes from judicial scrutiny cumulative effects of individual decisions that, on the whole, substantively disadvantage racial minorities. *Keyes* makes it possible for White parents to rationalize systemic advantages of a public education system, with-

108. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 234-35 (1973) (Powell, J., concurring in part and dissenting in part) (noting the multitude of "routine decisions" that can affect the extent of school segregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) (noting that "racially neutral" assignment of public school students may "fail to counteract the continuing effects of past school segregation").

109. The circumstantial evidence introduced in the *Keyes* litigation convinced the trial judge that the school board's decision making was not racially neutral. The school district assigned minority teachers to schools with a predominant minority enrollment and situated new schools in portions of the school districts that would draw enrollment of primarily one racial group. *Keyes v. School Dist. No. 1*, 313 F. Supp. 61, 69-73, 79-80, 83 (D. Colo. 1970), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973).

110. Freeman, *supra* note 42, at 1055-56. This is Professor Lawrence's view as well:

[T]he existing intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination and leads us to think about racism in a way that advances the disease rather than combatting it. By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended. And by acting as if this imaginary world was real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society. The decision to deny relief no longer finds its basis only in raw political power or economic self-interest; it is now justifiable on moral grounds. If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position.

Lawrence, *supra* note 41, at 324-25 (footnote omitted).

out having to question the history of racial relations that has resulted in a present day system that privileges them.¹¹¹ Race relations cannot advance if Whites can make such a wide range of decisions without considering the potentially harmful effects of their actions.¹¹² To racial minorities, this doctrinal position communicates majorities' lack of compassion and unwillingness to deal with the present effects of past discrimination.

3. *Individual Autonomous Acts versus Socially Constructed Actors.*—

The intent requirement also assumes that discrimination consists of individual acts that are clearly discernible and patently culpable. Yet, individuals are socially constructed actors. We exist in an environment that not only tolerates, but teaches, encourages, and supports negative stereotypes about racial minorities,¹¹³ as well as the "privilege" of a White social identity.¹¹⁴ We are not conscious of these influences, because they are so pervasive and so rooted in our social context that they now form part of a common cultural ideology—a sense of how the social order is and should be.¹¹⁵ Racial knowledge and the consequences thereof, as well as negative categories of racial social identity, inevitably influence social transactions between majorities and racial minorities.¹¹⁶

111. See *supra* notes 51-77 and accompanying text.

112. See Freeman, *supra* note 42, at 1054-56 (describing how the view of racial discrimination as the conduct of misguided individuals rather than a social phenomenon makes "even illusory progress in the quest for racial justice impossible"); Lawrence, *supra* note 41, at 344-55.

113. See *supra* notes 102-105 (discussing social scientific studies of stereotypes).

114. See Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED, *supra* note 106, at 7, 8 (discussing how legal language and doctrine have not recognized the pervasive notion of privilege); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 969, 970-71 (1993) (advocating that Whites become conscious of their race as the subtext of apparently neutral White decision making); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Womens' Studies*, in POWER PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (1995) (providing a personal account of facing up to White privilege as "an invisible package of unearned assets").

115. See Lazos Vargas, *supra* note 33, at 1527 (describing how cultural practices of Whites allow them to be unaware of the privileges and dominance into which they are born); Jeffrey Prager, *American Racial Ideology as Collective Representation*, 5 ETHNIC & RACIAL STUD. 99, 103 (1982) (claiming that differences between Whites and Blacks have historically been a "central organizing cultural principle in American life" and that "[t]he essential features seen to distinguish whites from blacks—in terms of character, capacities, spirit, etc.—have become deeply and inextricably woven into the cultural fabric of the nation").

116. See Flagg, *supra* note 114, at 969 (noting that "[t]here is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society" and describing the tendency of Whites not to be conscious of their race or this privilege as "the

Keyes and *Davis* reconstruct racial discrimination into individual atomistic acts, each discretely motivated, capable of isolation, and devoid of connection to a history of racial caste and a social context that supports racial privilege.¹¹⁷ The Court did not explain why this interpretation of race relations is mandated by the Equal Protection Clause. In *Keyes*, Justice Powell's concurring opinion's parade of White parents' horrors provides a glimpse as to what may be the Court's concern.¹¹⁸ In *Davis*, the rationale appears to lie in the Court's slippery slope argument that discriminatory racial impact could reach into every aspect of American lives.¹¹⁹

Why was this retreat from *Brown*'s broader view of stigmatic harm and social context necessary? These passages imply that the Equal Protection Clause should not be interpreted so broadly as to challenge actively the ideological common sense that orders a social world in which Whites enjoy superior status.¹²⁰ Sociologists who have studied Whites' racial attitudes report that Whites want to remain racially innocent.¹²¹ If this is so, it can be anticipated that Whites would resist attempts to recast apparently "normal" everyday interaction into a transaction that carries with it racial significance.¹²² According to the-

transparency phenomenon"); Janet Ward Schofield, *Causes and Consequences of the Colorblind Perspective*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 102, at 231, 233-35, 250 (setting forth research on a four-year study of peer relations at a middle school, and concluding that, although the effort to be color-blind "may ease initial tensions and minimize the frequency of overt conflict," it also poses the danger of "refus[ing] to recognize and deal with the existence of intergroup tensions").

117. *Washington v. Davis*, 426 U.S. 229, 246 (1976) (omitting any discussion of the historical oppression faced by Black job applicants and holding a facially neutral police recruitment test constitutionally valid); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973) (recognizing that the school board's racial segregation policy concerning one particular neighborhood could reach beyond the targeted schools, but nonetheless requiring an initial showing of intentional discrimination before remedial action is required).

118. See *supra* notes 62-77 and accompanying text.

119. See *supra* notes 90-91 and accompanying text.

120. Cf. *Freeman*, *supra* note 42, at 1065-67 (arguing that even a narrow, color-blind interpretation of *Brown* cannot avoid a broader notion of substantive equal protection that takes into account the historical context of racial domination).

121. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 46 (1993) (reporting interviews with five women and noting that their recollections, while failing to mention people of color, turned out to be only apparently all White, and that race functioned as an unconscious filter for their perceptions).

122. Cf. *id.* at 70 (noting that, in different ways, interviewees became "more cognizant of the [racial] patterning of their earlier experiences" only upon being interviewed and questioned); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 77-109 (1990) (implying that unarticulated White guilt, which influences Whites' thinking about African Americans, is a major factor in impeding honest racial dialogue). But see Annalee Newitz, *White Savagery and Humiliation, or A New Racial Consciousness in the Media*, in *WHITE TRASH* 131, 132-33 (Matt Wray & Annalee Newitz eds., 1997) (suggesting that White racial identity is aware of its internal contradictions, and that "there is certainly

ories of power relations, this kind of challenge would be deeply destabilizing to Whites and their sense of self and sense of social order.¹²³ Some even suggest that challenges to White dominance trigger anxiety.¹²⁴ Would challenging the majority's sense of social order and triggering the majority's innate resistance to this topic lead to better race relations? Is the judiciary's pursuit of White responsibility in cases where causality is amorphous a proper judicial role, and could this type of inquiry further impact negatively on race relations? These questions cannot be part of a constitutional dialectic because the Court responded to Whites' unease with the potentially broad impact of *Brown* and *Griggs* by removing vast areas of interaction between Whites and racial minorities from constitutional discourse.¹²⁵

4. *Culpability*.—By making the judicial inquiry one of locating culpable intent, the Court participates in reinforcing the myth of White racial innocence. Sociologist Ruth Frankenberg reports that Whites have come to understand racism as removed from them.¹²⁶ This "White innocence" reconceptualizes racism into something in which only *others* engage.¹²⁷ Thus, under the Court's analysis, racial injustice can be localized and limited to blameworthy individual actors or attributed to blameworthy acts of past (racist) decision makers.¹²⁸ All other Whites can claim nonculpability. By legitimizing the con-

a self-critical, and self-conscious, aspect to white identity, however faint, which demonstrates that whites are able to see themselves in the same way oppressed racial groups often see them").

123. See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS* 1972-1977, at 92-94, 158-59 (Colin Gordon ed., 1980) (asserting that power relations are constructed through discourses that constitute and reinforce power).

124. See Newitz, *supra* note 122, at 133 (positing that White racial identity is characterized by contradictions that manifest themselves as "fears about the unattainability of a total 'white power,' and a crippling sense of guilt caused by an (often repressed) acknowledgment of white racism").

125. See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (holding that the Court cannot find legislation furthering a neutral purpose invalid despite ramifications that may be more beneficial or burdensome to one race than another); see also *supra* text accompanying notes 111, 117-119.

126. FRANKENBERG, *supra* note 121, at 238.

127. See *id.* (arguing that evasion of color and power is a dominant racial discursive practice in the United States); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 310 (1990) (explaining that the affirmative action debate is framed in the rhetoric of White innocence, and that this perspective avoids dealing with problems of unconscious racism); Wildman & Davis, *supra* note 114, at 8-20 (explaining that the ability to avoid the consequences of racial power is a form of White privilege).

128. See, e.g., *Davis*, 426 U.S. at 246 (rejecting the contention of Negro police candidates that their poor performance resulted from the discriminatory design of a recruitment test, and emphasizing that the police department made affirmative efforts to recruit Negro candidates).

cept that White culpability can be limited to conscious atomistic acts, the Court de-emphasizes the larger context of White responsibility. If Whites can continue to enjoy privilege without questioning why it exists, race relations cannot advance.¹²⁹ Without recognition that construction of Whiteness, as privileged and virtuous, is directly related to the construction of racial minorities as inferior and nonvirtuous,¹³⁰ we will be unable to close the racial gap.

In sum, the manner in which the Court has constructed discrimination pragmatically relieves the Court from having to address very difficult issues that are particularly discomfoting to Whites. Racial minorities' *experience* with racism leads them to view racism as a systemic and pervasive phenomenon.¹³¹ For minorities, discrimination insinuates itself as daily racial "microaggressions."¹³² A majority of African Americans report experiencing discrimination in their everyday lives.¹³³ On the other hand, Whites live in an America in which they

129. Cf. Newitz, *supra* note 122, at 150 (criticizing the current deconstructionist White studies literature as a type of "self-punishment . . . [that] absolve[s] whites of their guilt without explicitly suggesting that they do more [about oppressive social practices] than criticize themselves").

130. The construction of minority racial identity is related to and dependent on the construction of White identity. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370-74 (1988) (describing the qualities that are culturally ascribed to African Americans as the antinomy of the qualities ascribed to Whites); Lazos Vargas, *supra* note 33, at 1555 (describing the dominant ideology that racial minorities are unwilling to assimilate and to work their way up from poverty as having developed in relation to the White ethnic immigrant narrative); Martha R. Mahoney, *The Social Construction of Whiteness*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 330, 330 (Richard Delgado & Jean Stefancic eds., 1997) (describing race as a relational concept and pointing out that "'good' neighborhoods are equated with Whiteness and 'black' neighborhoods are equated with joblessness").

131. See JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 15 (1994) ("When our respondents talk about being black in a country dominated by whites, they do not speak in abstract concepts of discrimination or racism learned only from books, but tell of mistreatment encountered as they traverse traditionally white places."); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 72-75 (1995) (recompiling and analyzing attitudinal data showing that African Americans are conscious of ongoing systemic discrimination against them and yet continue to pursue the "American Dream," and that more affluent African Americans see more systemic racial discrimination than do poor African Americans); see also HARRY H. L. KITANO & ROGER DANIELS, *ASIAN AMERICANS: EMERGING MINORITIES* 195 (2d ed. 1995) (reporting that 80% of African Americans, 64% of Hispanics, and 57% of Asians perceive prejudice against their group).

132. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565-66 (1989) (defining microaggressions as subtle nonverbal exchanges that insult Blacks and exercise a cumulative effect).

133. See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 11-26 (1993) (chronicling encounters of successful, well-educated Blacks with inescapable "racial demons"); WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (3d ed. 1992) (depicting the spectrum of discrimina-

can assume that they will enjoy fairness and can proclaim that racial minorities are also subject to the same fair treatment.¹³⁴ For Whites, racism exists in the abstract, as “‘racism-in-the-head,’” while for racial minorities, racism is concrete, as “‘racism-in-the-world.’”¹³⁵ The discrepancy between Whites and minorities in conceptualizing discrimination and talking about racism reflects different life conditions that cannot be ignored, assumed away, or reconciled. Rather, this epistemological divide reflects a troubled and complex interrelationship.¹³⁶ Yet the Court has premised its view of discrimination on the White perspective, while failing even to recognize the existence of an alternative point of view.¹³⁷

B. Sexual Orientation: Deference to Tradition

*Bowers v. Hardwick*¹³⁸ was a controversial and, for the gay and lesbian community, devastating decision. An article appearing in the popular gay and lesbian press, *Close to the Knives*, exemplifies the depth of feeling that this decision engendered:

A number of months ago I read in the newspaper that there was a Supreme Court ruling which states that homosexuals in America have no constitutional rights against the government's invasion of their privacy. The paper stated that homosexuality is traditionally condemned in America and only people who are heterosexual or married or who have families can expect these constitutional rights. There were no editorials. Nothing. Just flat cold type in the morning paper

tion faced by Blacks from the perspective of two African American psychiatrists); HOCHSCHILD, *supra* note 131, at 73 (noting psychological reports that African Americans who have made it socially and economically still feel rage at the constant prejudice and discrimination and concomitant loss of dignity they experience).

134. See HOCHSCHILD, *supra* note 131, at 61 (noting that in 1994, a majority of White Americans believed that race relations were getting better); ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 97 (1996) (citing a survey by the National Opinion Research Corporation according to which 66% of the Nation's population in 1944, and 69% in 1956, reported that most Blacks were treated fairly).

135. Lynne Duke, *Blacks and Whites Define Word 'Racism' Differently*, WASH. POST, June 8, 1992, available in 1992 WL 2183750 (quoting Judith Lichtenberg); see also Bob Blauner, *Talking Past Each Other: Black and White Languages of Race*, in RACE AND ETHNIC CONFLICT: CONTENTING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 18, 19, 22-23 (Fred L. Pincus & Howard J. Ehrlich eds., 1994) (describing the various ways that Whites and African Americans differ in how they conceptualize and talk about discrimination, making a meaningful dialogue difficult, if not impossible).

136. See *supra* notes 121-122, 124, 126-127, and 129 (discussing the writings of Ruth Frankenberg, Annalee Newitz, and Shelby Steele).

137. See *infra* Part V.C.2 (criticizing epistemological exclusion in recent affirmative action cases).

138. 478 U.S. 186 (1986).

informing people of this. In most areas of the U.S.A. it is possible to murder a man and when one is brought to trial one has only to say that the victim was a queer and that he tried to touch you and the courts will set you free. When I read the newspaper article I felt something stirring in my hand; I felt a sensation like seeing oneself from miles above the earth or like looking at one's reflection in a mirror through the wrong end of a telescope. Realizing that I have nothing left to lose in my actions I let my hands become weapons, my teeth become weapons, every bone and muscle and fiber and ounce of blood become weapons, and I feel prepared for the rest of my life.¹³⁹

Bowers v. Hardwick involved a defendant, Michael Hardwick, who was arrested under Georgia's sodomy statute (written in gender neutral terms) for performing oral sex with his long-term lover in the privacy of his own home.¹⁴⁰ The way that the Court framed the issue is key: Does the Due Process Clause confer a "right of privacy that extends to homosexual sodomy" that is "beyond the reach of state regulation"?¹⁴¹ The Court answered in the negative, holding that the Georgia state statute and the attorney general's selective prosecution of gay men would receive only rational basis review under the Due Process Clause.¹⁴² The Court offered two reasons to support the statute's constitutionality under this standard. First, the Court asserted a supposed factual justification, namely, that proscriptions against homosexual consensual sodomy have "ancient roots."¹⁴³ Second, the Court concluded that, although its previous cases had identified a fundamental right to decide whether to beget a child, these cases did not support Hardwick's position because "[n]o connection between fam-

139. DAVID WOJNAROWICZ, CLOSE TO THE KNIVES 80-81 (1991), reprinted in LESBIANS, GAY MEN, AND THE LAW 152 (William B. Rubenstein ed., 1993); see also Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 435 (1997) ("I don't think about sex when I read *Hardwick* and I don't think about what sex acts are at issue. I think how they hate me." (quoting Letter from William B. Rubenstein)); William B. Rubenstein, *Introduction to LESBIANS, GAY MEN, AND THE LAW*, supra, at xv, xvii (noting that "it is still illegal for lesbians and gay men to express love to one another").

140. See generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1612 (1993) (discussing the factual background of *Hardwick's* arrest).

141. *Bowers*, 478 U.S. at 189-90. See generally Brief Amicus Curiae for Lesbian Rights Project et al. at 8-9, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (arguing on the basis of *Griswold v. Connecticut*, 381 U.S. 479 (1965), that sexual conduct between consenting adults in the privacy of one's home is a basic right that merits heightened scrutiny under the Due Process Clause).

142. *Bowers*, 478 U.S. at 196.

143. *Id.* at 192 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)).

ily, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."¹⁴⁴

Both the rendition of the supposedly relevant facts and the rationale of the Court's decision can be read, as the author of the excerpt at the beginning of this section does, as variations of the same concept: that homosexuals, because of their sexual practices, are per se deviant, and that the state can regulate them as a class under the criminal code, because their sexual conduct is criminal-like.¹⁴⁵ With respect to the Court's factual assertion, Justice White's majority opinion is anchored in the view that Western tradition has historically disfavored homosexual sodomy,¹⁴⁶ a historical fact disputed by gay and lesbian historians.¹⁴⁷ Justice Burger's concurrence cited "firm[] root[s] in Judeo-Christian moral and ethical standards" as one justifi-

144. *Id.* at 191.

145. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1079-80 (1988) (arguing that the majority opinion and Burger's concurrence used a conception of "homosexuality" as immoral and criminally harmful, rather than as an identity or a normal variation of human sexuality, and that these definitions imply political value choices); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1748 (1993) (observing that sodomy as a bad act and homosexual identity are unified in the *Bowers* majority opinion by Justice White's "persistent, implicit invocations"); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 541-44 (1992) (arguing that in *Bowers* the Court carelessly embarks on a slippery slope that connects a subset of prohibited acts with the denial of rights to a class).

146. *Bowers*, 478 U.S. at 192 (noting that sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights).

147. See Goldstein, *supra* note 145, at 1082-84 & n.65 (detailing the history of the sodomy statute in Georgia and concluding that a 1784 version did not implicitly include sodomy); Halley, *supra* note 145, at 1751-56 (recounting the "common place" critique of the *Bowers* justices as poor historians); Hunter, *supra* note 145, at 541-43 (locating the *Bowers* Court's "misreading of history" in its failure to understand that the Framers were as intolerant of consensual heterosexual sodomy as they were of consensual homosexual sodomy). There has been a great deal of scholarship on this subject, arguing that the proscription against homosexual sodomy is a post-World War II innovation. See, e.g., JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 23 (1980) (documenting that the social and legal intolerance of gay male sodomy is a post-World War II innovation); Allan Bérubé, *Marching to a Different Drummer: Lesbian and Gay GIs in World War II*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 383, 383-84 (Martin Bauml Duberman et al. eds., 1989) (identifying the adoption of military policy addressing homosexuality during World War II as a turning point in the lives of American homosexuals, and contending that proscription against homosexuality in the military "made homosexuality of increasing concern to federal institutions"); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 706 (1997) (claiming that post-World War II American law contributed to the creation of "the closet," as heterosexuals developed an increasingly hostile attitude towards private homosexual lifestyles).

cation for *Bowers*,¹⁴⁸ a marked departure from the Court's usual strictly secular role.

The Court's second justification purports to be based on the rational claim that its prior cases on privacy and procreation do not support Hardwick's position because there is "[n]o connection between family . . . and homosexual activity."¹⁴⁹ This conclusion, however, is again based on the Court's own construction of the nature of homosexuality. There can only be no connection between homosexual "activity" and family if one concludes that the spiritual love and intimacy experienced in same-sex relationships is unlike the spiritual love and intimacy experienced by opposite sex couples.¹⁵⁰ The *Bowers* majority opinion, as well as the dissents, never consider how a same-sex relationship might look to those engaged in such a relationship and how this might be similar to heterosexual love.¹⁵¹ Rather, the majority reduces same-sex love relationships to "acts of . . . sodomy,"¹⁵² which the Court holds (under rational basis review) can justifiably be classified as criminal conduct.¹⁵³ The Court's reasoning is circular: (1) there can be no constitutional proscription of selective persecution of gay men under state sodomy statutes, because (2) there is no connection between family and homosexual activity because (3) same-sex couples engage in sodomy, which, (4) according to criminal law and tradition is deviant.¹⁵⁴

The Court's adoption of the view that homosexuals, because of the way they engage in sexual relations, are inherently deviant goes beyond "choosing" between two controversial truths held by majorities and minorities, whose interests may or may not be inimical to each

148. *Bowers*, 478 U.S. at 196 (Burger, J., concurring). But see *Shahar v. Bowers*, 836 F. Supp. 859, 866 (N.D. Ga. 1993) (acknowledging that the Reconstructionist Movement of American Judaism sanctions same-sex relationships), *aff'd*, 114 F.3d 1097 (11th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 693 (1998).

149. *Bowers*, 478 U.S. at 191.

150. See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 27-31 (1995) (arguing that same-sex love is deviant because only the physical union of the male and female sexual organs can result in moral sexual intimacy).

151. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 103-08 (1996) (criticizing *Bowers* for its failure to recognize the shared values of homosexual intimacy and heterosexual love).

152. *Bowers*, 478 U.S. at 192; see also *Boutilier v. INS*, 387 U.S. 118, 120-123 (1967) (accepting the INS argument that a homosexual could be deported on the grounds that homosexuality indicates a "psychopathic personality").

153. *Bowers*, 478 U.S. at 196.

154. *Id.* at 191-94; see also Cain, *supra* note 140, at 1618, 1628 n.405 (laying out inconsistencies in the Court's argument).

other. Bowers "essentializes" homosexuals into a sexual act, sodomy.¹⁵⁵ By sanctioning the state's selective prosecution of sodomites who are homosexuals, the Court normalizes and legitimizes the homophobic ideology that rationalizes discrimination, ostracization, and ultimately violence against gay men and lesbians.¹⁵⁶

According to Professor Young-Bruehl's recent innovative theories about prejudice, there is more than one kind of prejudice.¹⁵⁷ Prejudices play out in social settings as "ideologies of desire," backlashes against movements of equality that are rooted in an unconscious rejection of these movements.¹⁵⁸ In the case of homophobia, what unifies the various prejudices is their focus on sodomy.¹⁵⁹ For example, what Young-Bruehl calls the "narcissistic homophobe" condemns "not just passive or penetrated male homosexuals, but the act of anal penetration and homosexuality per se."¹⁶⁰ This kind of anti-homosexuality wants to control sexual behavior rigidly.¹⁶¹ What Young-Bruehl calls the "obsessional homophobe" visualizes homosexuals as "a lower or lesser human type . . . monsters or deviants from the two norms of male and female."¹⁶² The more extreme "obsessional" homophobes target gay men based on a belief that they molest

155. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 547-50 (1992) (describing how majority culture essentializes gay men and lesbians into one-dimensional sexual beings, and arguing that gay culture involves more than a sexual choice); Halley, *supra* note 145, at 1737 ("Sodomy in these formulations of homosexuality as a special right is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us."); Hunter, *supra* note 145, at 543 ("Homosexual sodomy . . . not only becomes the totality of sodomy, it also becomes the totality of homosexuality").

156. See, e.g., Cheryl Lavin, *Death of a Sailor: Allen Schindler's Brutal Murder Made Him a Symbol in the Fight for Gay Rights*, CHI. TRIB., Aug. 10, 1997 (Magazine), available in 1997 WL 3576939 (noting that, in the 1992 beating death of Naval officer Allen Schindler, his assailants justified their violence because the victim was gay); Guy Trebay, *Beyond the Fence: Conjuring the Lives of Martyr Matthew Shepard*, THE VILLAGE VOICE, Nov. 3, 1998, at 28 (asserting that the 1998 beating death of college student Matthew Shepard was motivated by Shepard's homosexuality and reporting that the assailants' girlfriends alleged that Shepard made a pass at them, and that the assailants intended to "teach [Shepard] . . . not to come on to straight people").

157. YOUNG-BRUEHL, *supra* note 134, at 15-26, 152-59, 435.

158. See *id.* at 30 ("Prejudices institutionalize at deeper and more inchoate individual and social or political levels the differences between 'us' and 'them' that movements for equality address.").

159. See *id.* at 445 (noting that homosexuals "are imagined as hypersexual, archaically libidinous and promiscuous and are defined by their sexuality").

160. *Id.* at 439.

161. Professor Finnis makes this argument. See Finnis, *supra* note 150, at 27-31.

162. YOUNG-BRUEHL, *supra* note 134, at 446.

children and attempt to persuade children and youth to adopt their immoral homosexual lifestyle.¹⁶³

One need not endorse Professor Young-Bruehl's social psychoanalytic theory that prejudice is a projection of individuals' latent ideologies of desire to recognize that the dominant image that drives various forms of antihomosexuality, including violence, is the image of homosexuals as deviants and sodomites.¹⁶⁴ This image feeds the narrative that gay men and lesbians need to be put into their place (the closet) lest they infect the rest of society.¹⁶⁵ The *Bowers* decision ratifies the claim that homosexuals are per se deviant; that their conduct can be criminalized even if it is taking place in the privacy of the home, because it is inherently immoral; that state attorneys general who wish to safeguard the morals of the public can selectively prosecute gay men and lesbians. This Supreme Court opinion serves to strengthen the resolve of those who will not tolerate homosexuals in their midst.¹⁶⁶

Bowers has a second unfortunate consequence. It promotes a stereotypical social image of gay men and lesbians. *Bowers* essentializes gay men's and lesbians' social identity into one aspect of the human personality, the manner in which homosexuals physically express sexual love.¹⁶⁷ Post-*Bowers*, in order to gain the right not to be the object of prejudice, gay men and lesbians must show that they are not sodomites, or do not think or talk as if they were sodomites.¹⁶⁸ This bifur-

163. *Id.* at 447-48.

164. See Fajer, *supra* note 155, at 544 (opining that the majority of the Supreme Court equates homosexual status with sodomy); Halley, *supra* note 145, at 1746-49 (same); Hunter, *supra* note 145, at 543 (same).

165. See Eskridge, *supra* note 147, at 705 (describing the "closet" as "the classic metaphor for homosexual secrecy" that has been used in both protective and threatening ways).

166. See *Shahar v. Bowers*, 114 F.3d 1097, 1110 n.25, 1110-11 (11th Cir. 1997) (en banc) (citing *Bowers*, and rejecting a constitutional challenge to a Georgia Attorney General's firing of an attorney solely because she was a lesbian who participated in a commitment ceremony with another woman), *cert. denied*, 118 S. Ct. 693 (1998). Despite the effect of the Court's opinion, there is evidence that antigay sentiment is neither uniform nor widespread. A recent report by the Policy Institute of the National Gay and Lesbian Task Force analyzing various poll data concludes that disapproval of gay men and lesbians is decreasing, and that there is a general trend toward greater tolerance. In 1997, the gap between those who believe that a gay lifestyle is acceptable versus nonacceptable had narrowed; 43% believe gayness is acceptable while 52% think it is not. See ALAN S. YANG, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 21, 24 (1998).

167. See Cain, *supra* note 140, at 1625 (opining that judges refuse to recognize gay and lesbian equal protection claims based on the *Bowers* decision because they assume that all gay men and lesbians engage in homosexual sodomy); Fajer, *supra* note 155, at 544 ("A majority of the Supreme Court appears to share the view that gay men and lesbians are sexual creatures divorced from intimacy, relationships, and family."); *id.* at 512-14, 544-46.

168. See Cain, *supra* note 140, at 1624-25 (stating that to prevail in an equal protection action supporting gay and lesbian rights, a litigant should distinguish homosexual status

cation of human identity into status, which post-*Bowers* might be protected under the Fourteenth Amendment, and sexualized conduct, which can be criminalized under *Bowers*, dehumanizes gay men and lesbians. For gay men and lesbians to gain acceptance into mainstream society, they must forego that part of their selves that loves sexually.¹⁶⁹

In sum, the *Bowers* Court chose a construction of gay and lesbian social identity that marginalizes the humanity of a minority group. Yet, as in the race context, the Court chose one viewpoint without even recognizing the existence of a competing epistemology or point of view.¹⁷⁰ The Court truncated the dialectic that needs to take place between gay men and lesbians and members of the majority by failing to recognize that the important cultural traditions are debatable. Every society must be able to deliberate about which norms must be preserved because these norms account for the moral strength of society, and which norms should be revised because of changing conditions and values. Gay men and lesbians should be afforded the opportunity to demonstrate how apparently "neutral" social norms and long-standing "traditions" can function to ostracize them, perpetuate negative stereotypes, and, at the extreme, create conditions of violence. At the same time, judges should recognize that not all who object to gay civil rights are homophobes. There are those who hold strong moral convictions that homosexuality and homosexual sodomy are immoral. These moral conservatives should be able to voice their desire not to be placed in social and political situations in which they feel themselves to be involuntarily witnessing or condoning immoral conduct. The process of beginning to reconcile these interests cannot occur if the Court has already weighed in on the side of intolerance. The very visibility of gay men and lesbians in such a dialogue could transform ideologies on which prejudice is based.¹⁷¹

This Part has analyzed a select group of controversial intergroup conflict cases, and shown that in these decisions the Court has inter-

from homosexual conduct in order to overcome the judicial presumption that all lesbians and gay men engage in homosexual sodomy).

169. See *id.* at 1641 (noting that the emphasis on status as distinct from conduct "de-emphasize[s] the importance of gay men and lesbians of . . . the love and affection they feel for their partners"); Fajer, *supra* note 155, at 549 (same); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 919-23 (1989) (same).

170. Cf. Halley, *supra* note 169, at 915-17 (arguing that, by refusing to secure protection of homosexual rights based on substantive due process, the Court in *Bowers* deferred to the majority, contrary to the spirit of process-based judicial review).

171. See YOUNG-BRUEHL, *supra* note 134, at 452-53 (explaining that the increasing self-assertiveness of gay men and lesbians may help to overcome homophobia).

puted social reality from only one perspective—that of the majority. For the majority, this choice often goes unnoticed, because there is no dissonance between the Court's chosen social text and how majority group members themselves *experience* social life. The decisions reflect majority epistemology. Minorities, by contrast, perceive the Court's lack of reasoned justification for its choice of the majority perspective (and nonacknowledgment of minorities) as "choosing sides." From minorities' perspective, what they read in the Court's decisions differs greatly from their own *life experience*, specifically how they experience discrimination or sexual orientation. The Court's justifications for results that favor the majority cannot be accepted because they are dissonant with the experiences of minorities and ultimately oppressive. The remainder of this Article will discuss the consequences of this epistemological privileging for the Court's legitimacy and for the polity as a whole and will offer a more salutary model of public reason.

II. WHY WE CAN EXPECT MAJORITIES' AND MINORITIES' EPISTEMOLOGIES TO CONTINUE TO DIFFER

The legitimacy critique elaborated thus far is based on the proposition that epistemologies of majority and minority groups are different. This Part provides a theoretical framework found in the work of social scientists and other theorists that demonstrates not only why majority and minority groups view the world differently, but also why social and psychological forces will continue to keep these views separate.

Some social scientists describe differences between majorities and minorities as socially constructed. This seemingly simple idea carries with it many implications, some of which have come to form part of mainstream legal thinking, others of which remain deeply controversial. Those who are involved in the study of majority and minority relations, such as cultural ethnologists, race theorists, feminists, sociologists, and postmodernists (including critical legal theorists), apply this concept of social construction in a variety of ways.¹⁷²

172. Critical Legal Studies (CLS), Critical Race Theory (CRT), feminists, and the growing LatCrit and White Critical Studies movements are all based on this idea. CLS describes how rules of law play an ordering function in which certain discourses can claim greater legitimacy and normalcy over others. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 769-780, 779 (1985) (arguing that the relationship between knowledge and power is at the core of all authoritative discourses); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. LAW & SOC. CHANGE 369, 370 (1982-1983) ("[T]he legal system is an important public arena through which the State attempts—through manipulation of symbols, images, and ideas—to legitimize a social order . . ."); Gary Peller,

Part I's case analysis introduced the argument that difference is socially constructed. This idea is implicit in the claim that members of majorities, as well as minorities, are social actors.¹⁷³ Because as social actors we order the social world around ideological frameworks, we continue to perceive and understand social dynamics in a way that permits us to remain unconscious of an existing unequal order.¹⁷⁴ We may occasionally recognize our degree of separateness, as Ruth Frankenberg's work suggests, but such recognition can be quickly rationalized so that we remain comfortable within our social ideological framework.¹⁷⁵

The social construction of difference is maintained and legitimized because cultural ideology¹⁷⁶ (social knowledge) provides a

The Metaphysics of American Law, 73 CAL. L. REV. 1151, 1182 (1985) ("[L]egal thought is a representational discourse which purports to represent social relations in a neutral manner. . . . [L]egal discourse can present itself as neutral and determinate only to the extent that it denies its own metaphoric starting points and instead pretends to reflect the positive content of social relations.").

Feminists study the social construction of gender and how gender norms order social relations between men and women. See, e.g., CATHERINE MACKINNON, *FEMINISM UNMODIFIED* 32 (1987) (claiming that "gender is socially constructed as difference epistemologically"); Baldwin, *supra* note 32, at 48-49, 160-62 (discussing institutionalized, structural general oppression in the public sphere of women's lives).

Developing LatCrit scholarship, like CRT, concerns the critique of legal rules and doctrines from the perspective of ethnic minorities and, more specifically, Latinos/as, as well as alternative jurisprudential approaches that do not overlook the interests and particularities of these communities. See generally Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 745-46 (1994) (containing a thoughtful and lucid summary of CRT scholarship and the multiplicity of issues, methodologies, and central ideas that such scholarship is currently addressing); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 4-12 (1996) (encouraging development of critical legal discourse focusing specifically on concerns of the Latino community).

White critical studies puts at issue Whiteness as a racial status. Recent work by sociologists and legal theorists has focused on how Whites can reconceptualize their privileged position in order to further social justice goals. See, e.g., DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS AND WORKING CLASS HISTORY* 12-17 (1994) (opining that a better understanding and approach to eradicating race and class oppression can be gained by examining Whiteness within American society); Mahoney, *supra* note 130, at 330-32 (identifying aspects of Whiteness that could both undermine the construction of privilege and oppression and unite "Whites along with people of color, in opposition to privilege"); *supra* note 114.

173. See *supra* notes 102-106 and accompanying text (discussing the effect of negative racial stereotypes in the context of social interactions).

174. Cf. Hamilton & Trolier, *supra* note 102, at 133 (defining a stereotype as a cognitive structure that contains the perceiver's expectancies and beliefs about a certain group).

175. FRANKENBERG, *supra* note 121, at 231-35, 232 ("In times of perceived threat, the normative group may well attempt to reassert its normativity by asserting elements of its cultural practice more explicitly and exclusively.").

176. Sociologist Jeffrey Prager describes ideology as follows:

"common sense"¹⁷⁷ (truth) as to why and how minorities are different. Cultural ideology is constructed around social narratives that reinforce and maintain relations of social inequality (power).¹⁷⁸ For example, in *Bradwell v. Illinois*¹⁷⁹ the Court depicted women as needing patriarchal protection from public life. In *Bradwell*, the Court upheld a statute proscribing women's entry into the legal profession.¹⁸⁰ In his concurrence, Justice Bradley wrote that the basis for denying such entry was that women's activity outside the family was "against the nature

[I]deology comes to be mistaken for reality. The images that are evoked concerning racial groups come to be the prism through which observation of the real social world is conducted. Only the passage of time and the emergence of new understandings reveal how previous efforts to comprehend . . . differences serve to justify and, in a limited sense, legitimate inequity. . . . [A]ny racial ideology is inadequate in so far as it cannot comprehend the individual in the group. What stands for explanation at the ideological levels easily dissolves when confronted with social reality. . . . [I]deology . . . represents the dominant, more or less culturally universal scheme by which the social order is understood and explained.

Prager, *supra* note 115, at 100-02 (citation omitted); see Clifford Geertz, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ* 193, 193-233 (1973) (arguing that the function of ideology is to provide authoritative concepts that render culture meaningful, and images by which it can be sensibly grasped); RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 39 (2d ed. 1993) ("[I]deology often makes cultural facts appear natural, social analysis attempts to reverse the process. It dismantles the ideological in order to reveal the cultural, a peculiar blend of objective arbitrariness . . . and subjective taken-for-grantedness (it's only common sense—how could things be otherwise?")); YOUNG-BRUEHL, *supra* note 134, at 97 (emphasizing that ideology functions at an unconscious level to (i) operate against self-consciousness and thereby avoid rigorous reasoned examination, and (ii) protect against revealing internal contradictions that are pervasive and self-reinforcing).

177. Antonio Gramsci, a Marxist, believed that hegemony was embedded in the popular system of ideas and practices, what he termed "common sense." See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 198-99, 212 (Quintin Hoare & Geoffrey Nowell Smith trans., 1971) (describing "common sense" as the apparently spontaneous feelings of the masses that have been formed by the traditional popular conception of the world, which is a "historical acquisition"); see also SUE GOLDING, *GRAMSCI'S DEMOCRATIC THEORY: CONTRIBUTIONS TO A POST-LIBERAL DEMOCRACY* 110-11 (1992) (describing Gramsci's concept of "common sense" as the incoherent notion of the masses that conforms to their social and cultural position, but which also serves as the starting point for revolutionary action). The interplay between knowledge, truth, and power is most famously made by Foucault. See generally Foucault, *supra* note 123 (interweaving the relationship between knowledge (as socially constructed), "truth" (not always an objective truth), and social power (which permeates every social relationship)); see also Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 742 (1996) ("The social phenomenon of power is possible only because it is a shared hermeneutic phenomenon: It is a contingent product of common ways of understanding and living in a social world, a function of reciprocally enacted roles, routines, institutions and understandings.").

178. See, e.g., MACKINNON, *supra* note 172, at 40 ("Gender is also a question of power, specifically of male supremacy and female subordination.").

179. 83 U.S. (16 Wall.) 130 (1872).

180. *Id.* at 139.

of things,"¹⁸¹ and that it was "repugnant" to permit a woman's independence from her family and her husband.¹⁸² Justice O'Connor frequently cites *Bradwell* to illustrate the principle that traditional notions about women's differences contribute to the unequal status of women.¹⁸³

In order to understand how minority and majority communities acquire distinct epistemologies, the key insight is that social position influences what we experience, how we interpret this experience, and how we construct knowledge.¹⁸⁴ In the terms of feminist "standpoint" theory, social position "situates knowledge."¹⁸⁵ In the aggregate, individual minorities share a band of social space from which they experience social life differently from majorities.¹⁸⁶ It is this experience that

181. *Id.* at 141 (Bradley, J., concurring); see also *Muller v. Oregon*, 208 U.S. 412, 420 (1908) ("[W]oman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.").

182. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring); see also *Muller*, 208 U.S. at 421 ("[H]istory discloses the fact that woman has always been dependent upon man . . . [a]s minors, though not to the same extent . . . needing especial care that her rights may be preserved."). For a discussion of these cases, see Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117, 117-39 (David Kairys ed., 1982).

183. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (citing *Bradwell* for the proposition that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function"). Justice O'Connor seems to view *Bradwell* as the paradigmatic example of gender discrimination. See Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1550 (1991) (noting that, until the last half of the twentieth century, the Court generally accepted the separate and unequal status of women, and citing *Bradwell*); see also *infra* Parts V.B.1-2 (discussing Justice O'Connor's analysis of gender stereotypes).

184. See Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 BERKELEY J. SOC. 1, 3 (1987) (asserting that, from the social scientific view, "what exists is not 'social classes' as understood in the realist [sense] . . . , but rather a *social space* in the true sense . . . that the fundamental property of a space is the reciprocal externality of the objects it encloses").

185. See NANCY C.M. HARTSOCK, *MONEY, SEX, AND POWER* 226 (1983) ("[T]he systematic differences between the accounts of power produced by women and men can be taken to be indications of systematic and significant differences in life activity."); Sandra Harding & Merrill B. Hintikka, *Introduction to DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* ix, x (Sandra Harding & Merrill B. Hintikka eds., 1983) ("Women's experience systematically differs from the male experience upon which knowledge claims have been grounded."). See generally Susan Hekman, *Truth and Method: Feminist Standpoint Theory Revisited*, 22 SIGNS 341, 342 (1997) (arguing that feminist standpoint theory's notion of situated knowledge makes possible a politics of difference).

186. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* xiii (1990) (illustrating that minority groups, in order to gain acceptance, often convey their ideas according to majority norms that distort the minority perspective); IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 25 (1997) (describing the experi-

creates a distinct epistemology, not minority status or identity.¹⁸⁷ Under this theory, social scientists can make generalizations about minority experience, as well as the epistemology founded upon that experience, based on observations of how individuals encounter a common social space, and how others relate to them.¹⁸⁸ However, any generalization will be subject to multiple interpretations (all of which may be reasonably accurate) because it will be an external interpretation of the meaning of aggregate individual social experiences.

What does this qualitatively different social space look like? First, individuals experience socially constructed difference constantly.¹⁸⁹ When groups are labeled as different from the universal ideal, this label creates and reinforces dynamics of inequality, in the form of privilege/domination for the majority and relative nonprivilege/subordination for the minority.¹⁹⁰ The majority uses its social power to create a social identity for the nonconforming "other."¹⁹¹ Those who are different are essentialized into a socially constructed identity that

ence of minority social groups in terms of "[t]he collective otherness of serialized existence . . . [that is] often experienced as constraint, [so that] . . . [m]embers of the series experience themselves as powerless to alter this material milieu [of their experience]"); Patricia Hill Collins, *Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Where's the Power?*, 22 SIGNS 375, 378 (1997) (arguing that social standpoint theory is suited to explain dilemmas of class and race in light of the fact of segregation among classes and race).

187. Some race theorists and feminists have argued that the minority perspective should be privileged. See COLLINS, *supra* note 186, at xii-xiii (arguing that social justice demands should be looked at from the perspective of Black feminists); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice."). But see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1781-84 (1989) (criticizing the essentialist racial perspective position). This Article rejects the proposition that status alone can result in a "minority perspective," because a minority may not experience a subordinate social position for various reasons. See *infra* notes 198-207 and accompanying text (discussing the multiplicity of identities within minority social space).

188. See *supra* notes 185-186 and *infra* note 194.

189. Cf. Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, The Nas, and Apartheid*, 41 DEPAUL L. REV. 1141, 1145 (1992) ("Race thus cannot be eliminated by the actions of any one individual because it lives in the combined activities of black and white people. This is the box that race has created for all of us . . .").

190. See MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 12, at 111 ("The attribution of difference [to the person who does not fit in] hides the power of those who classify and of the institutional arrangements that enshrine one type of person as the norm, and then treat classifications of difference as inherent and natural while debasing those defined as different."); see also *supra* note 114 (describing White privilege).

191. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990) ("Cultural imperialism involves the universalization of a dominant group's experience and culture, and its establishment as the norm.").

becomes the counterimage of the dominant, universal ideal.¹⁹² For example, women are expected to be supportive and passive in accordance with their essentialized social identity. Those who do not fit this identity of "otherness" are treated with suspicion, further marginalized as deviant, and are often the objects of heightened hostility.¹⁹³ To be labeled as different implies being trapped into socially constructed boxes—woman, African American, lesbian, Latino/a. Social identity boxes place the individual, regardless of her personal preferences or self-identification, into categories that implicate general social judgments of lesser worth, less capability, and subordinate status. These "boxes" differ in the quality of (relative) subordination: stigma (race and handicapped status); caste (African Americans and other racial minorities at the time of Jim Crow); stereotypes (gender); deviancy (homosexuality); and coercive assimilation (Native Americans and other cultural or racial minorities such as Latinos and Asian

192. See Crenshaw, *supra* note 130, at 1373-74 (describing how law and custom create "races" out of broad ranges of human traits, assigning negative images to African Americans as counterparts to positive images for Whites, such as "industrious-lazy").

Women's social identity has been created as care-givers, passive, supportive, submissive, and nonthreatening. This social image supports and reinforces women's subordinate power and status. See MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 9-10 (1983) (arguing that women are confined by various modes of service); MACKINNON, *supra* note 172, at 25 (stressing that the social treatment of women results in powerlessness).

Recently, scholars have argued that the immigration debate feeds off foreignized social identity as well as nativistic impulses, resulting in a direct impact on these minority communities. See ROSALDO, *supra* note 176, at 209-14 (describing the media representation of Latinos in terms of their continued definition by the majority, so as to expose the "myth of immigration as a cultural stripping away"); Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 8, 9 (1995) (noting that complaints filed with the Los Angeles County Commission of Human Relations demonstrated a 23.5% increase in hate crimes against Latinos since the enactment of Proposition 187 and concluding that Proposition 187 "[has] transformed everyday life for Latinos of every status, including those born here and those whose ancestors have lived in the U.S. for generations"); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: "A Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1136-40, 1144-47, 1154-58 (1998) (arguing that the current political movement targeting illegal immigrants, "a/k/a Mexican immigrants," is a reflection of the majority's discomfort with Mexican Americans as a distinctive cultural group).

193. See, e.g., Crenshaw, *supra* note 130, at 1383 (describing how the feeling of some Whites that Blacks have "gotten too far" has produced a "backlash attitude" against economically successful Blacks). See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975) (describing how social discipline mechanisms reflect and support a hierarchy of social power); RACE-ING JUSTICE, *EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (Toni Morrison ed., 1992) (containing essays by various authors on the Clarence Thomas-Anita Hill confrontation, which served as a vivid example of this social phenomenon).

Americans).¹⁹⁴ Thus, difference, discrimination, and prejudice all involve multiple dynamics. What these phenomena share is the quality of "otherness" and complete omission from the norm.

Second, as Charles Taylor writes, occupying relatively subordinated social space affects how minorities see themselves:

The thesis is that our identity is partly shaped by recognition or its absence, often by the *misrecognition* of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.¹⁹⁵

Third, social attribution of difference has economic and capital accumulation implications. Sociologists have investigated how race and gender have been used to deny minorities access to occupations, as well as other social capital venues, so that they become unable to progress up the economic ladder, obtain higher paying occupations, amass capital, and gradually become "full citizens" in the sense that American capitalism provides context to this term. These sociologists conclude that occupations which provide opportunities for economic and social advancement generally have been limited to Whites and men.¹⁹⁶

194. See FRYE, *supra* note 192, at 1-16 (describing insidious forces that confine and shape the life experience of oppressed persons); YOUNG, *supra* note 191, at 59 ("Those living under cultural imperialism [a system of apparently self-evident stereotypes that permeate society] find themselves defined from the outside, positioned, placed, by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify and who do not identify with them."). See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2-7, 24-32, 48-49 (1963) (describing the components of "stigma," including its origin in physicality, its subsequent social construction as a negative trait, its social visibility, and its internalization by the stigmatized individual); *supra* notes 114, 116, 127 (describing the dynamic of privilege/nonprivilege).

195. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Gutmann ed., 1994).

196. See ROEDIGER, *supra* note 106, at 55-60 (discussing how from the beginning of our history certain occupations remained off-limits to racial minorities, particularly African Americans); see also ALMÁGUER, *supra* note 106, at 13-14, 25-26, 72, 100-04 (discussing the historical, sociological, and economic forces that contributed to the occupational and residential segregation of Mexican Americans, Native Americans, and Asian Americans in California).

A similar kind of segregation is evidenced in what sociologists term occupational sex segregation. See COMMITTEE ON WOMEN'S EMPLOYMENT AND RELATED SOCIAL ISSUES, *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* 1-32 (Barbara F. Resken & Heidi I. Hartmann eds., 1986) (discussing occupational sex segregation); Nancy Barrett, *Women and the Economy*, in *THE AMERICAN WOMAN 1987-88: A REPORT IN DEPTH* 100, 100-05 (Sara

These are the principal dynamics that define minorities' relatively subordinate social space. Individual minorities, however, may function differently in this space

Professor Iris Marion Young's concept of "serialized collective identities" indicates that when we theorize about minorities' social space, we are generalizing about common elements that individual minorities experience in common with other members of the class.¹⁹⁷ Within such relative subordinate social space, each minority individual can, within limits, exercise effort to escape negative social identity or to blur social boundaries.¹⁹⁸ For example, minority individuals can distance themselves from undesirable social identities. They can assimilate or adopt cultural views and modes of expression aligned with the dominant group. They can attempt to "pass."¹⁹⁹ They may be able to distance themselves psychologically from discriminatory social experiences as unrelated to their social identity.²⁰⁰ Another way to lessen the impact of relative subordinate social space is to emphasize the more privileged social identity among the many to which each minority individual belongs.²⁰¹ For example, Audre Lorde wrote that she was "a forty-nine-year-old Black lesbian feminist socialist mother of

E. Rix ed., 1987) (noting that women earn lower wages than men in part as a result of traditional perceptions of women's social roles).

197. See YOUNG, *supra* note 186, at 26 (suggesting that "[m]embership in serial collectives defines an individual's being, in a sense . . . together in series with others similarly positioned").

198. *Id.* at 31 (indicating that "[a person] can develop a sense of herself and membership in group affiliations that makes different serial structures important to her in different respects, or salient in different kinds of circumstances").

199. See Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602 (1989) (illustrating the tendency of minorities to assimilate characteristics of the dominant group in order to prevent feelings of uneasiness); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-15 (1993) (sharing her grandmother's experience of portraying herself as White in order to secure a job and economic security as a department store employee); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1266 (1997) (relating his choice to remain identified as a Chicano and his brother's choice to pass as White). Similarly, if we consider gay men and lesbians a cultural group, the decision to stay "in the closet" is a form of "passing" because it enables these individuals to avoid being located in a stigmatized group. See Eskridge, *supra* note 147, at 705 (describing the "closet" as a place where "private skeletons and personal secrets are hidden").

200. See GRIER & COBBS, *supra* note 133, at 154-80 (noting that minorities must adopt psychological mechanisms that allow them to distance themselves from daily "microaggressions" in order to maintain psychological health).

201. See, e.g., Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, in PRIVILEGE REVEALED, *supra* note 106, at 161, 161-76 (describing Professor Wildman's own multiple memberships as a professor, White woman, Jew, and pioneer for justice); Wildman & Davis, *supra* note 114, at 7-24 (describing the multiple identities we inhabit as strands in a Koosh ball); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*,

two, including one boy, and a member of an interracial couple."²⁰² Although she was able to choose how she moved in and out of her multiple social identities, she noted that she was limited in escaping her minority social space: "I usually find myself a part of some group defined as other, deviant, inferior, or just plain wrong."²⁰³

This multiplicity of identities and limited agency within minority social space means that some individuals within a "serialized collective" will experience minority status more harshly, while others might not experience it at all.²⁰⁴ It follows that the serialized collective experience is not a unified, easily definable experience, but a series of individuals experiencing a similar social life.²⁰⁵ As sociologists and feminists have argued, social identity and social groups are dynamic and complex; generalizing about group status is fraught with the dangers of overstating one's case and not sufficiently accounting for the multiplicities of a collective minority identity.²⁰⁶ Because such an identity will be amorphous, difficult to define, and dynamic, both feminists and race theorists have developed multiple interpretations of the social significance of gender and race.²⁰⁷

The controversy within the minority legal academy unleashed by Professor Randall Kennedy's article, *Racial Critiques of Legal Academia*, in which he criticized the scholarship of critical race theorists Derrick Bell, Richard Delgado, and Mari Mastuda,²⁰⁸ illustrates the apparent

1991 DUKE L.J. 296, 306 (describing the multiple cultural memberships, both privileged and unprivileged, of her African American male colleague).

202. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114, 114 (1984).

203. *Id.*

204. See YOUNG, *supra* note 186, at 27 ("Membership in the series does not define one's identity.").

205. See *id.* (defining "seriality" as the unreflective reproduction of ongoing historical social structures, against which individual differences within a group may emerge).

206. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* xi, 3 (1990) (contesting any general classification of "woman"); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 162-64 (1988) (arguing that feminist theory must take into account differences among women).

207. See generally BABCOCK ET AL., *supra* note 32, at 386, 388 (discussing various definitions of the terms "gender" and "sex"); Baldwin, *supra* note 32, at 48 (analyzing feminist accounts of women in different social roles); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2008-11 (1991) (describing the "voice of color" as including Randall Kennedy's view, which assimilates "meritocratic majoritarian standards," as well as Derrick Bell's, Richard Delgado's, and Mari Matsuda's, which are concerned with the class implications of racial minorities).

208. Kennedy, *supra* note 187, at 1788-1810. Kennedy's critique is often cited with Stephen Carter's. See Stephen Carter, *The Best Black, and Other Tales*, 1 RECONSTRUCTION NO. 1, 1990, at 6. The *Harvard Law Review* published a reply to Kennedy in *Colloquy, Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844, 1844-86 (1990) (presenting commentary by Scott Brewer, Milner S. Ball, Robin D. Barnes, Richard Del-

confusion and difficulty in interpreting a minority epistemology. This controversy revolves around when and under what circumstances a scholar can claim to be voicing a minority perspective. Kennedy argued that critical race scholars exhibit "a tendency to evade or suppress complications that render their conclusions problematic [T]hey fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars of color produce a racially distinctive brand of valuable scholarship."²⁰⁹ Among his claims, he contended that these minority scholars placed too much emphasis on an experienced commonality of "oppression."²¹⁰

Professor Alex Johnson's article, *The New Voice of Color*, reconciles this apparent schism between these varying interpretations of minority experience.²¹¹ He argues that there is an important commonality in Kennedy's and critical race scholars' interpretation of the salience of race. They all believe that there exists a unique racial experience that affects racial minorities—racial prejudice—and that society, as currently structured, needs to eradicate unequal treatment based on race.²¹² Alex Johnson explains that Bell, Matsuda, and Delgado speak from a communalistic perspective²¹³ and from an egalitarian ideology.²¹⁴ They wish to improve the circumstances of those in minority communities who are most disadvantaged.²¹⁵ On the other hand, Kennedy's interpretation of racial experience is individualistic²¹⁶ and

gado, and Leslie G. Espinoza); see also Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) (addressing Kennedy's essentialism critique); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (criticizing Randall Kennedy's positions from a CLS perspective).

209. Kennedy, *supra* note 187, at 1749.

210. *Id.*; see *id.* at 1764 (asserting that Bell fails to engage competing hypotheses to explain the small number of professors of color in elite law schools); *id.* at 1770 (accusing Bell of overstating the relative influence of racial prejudice); *id.* at 1774 (finding fault with Delgado's failure to provide examples of writings by scholars of color that were overlooked by White authors); *id.* at 1776 (arguing that Delgado too easily accepts the merit of minority scholarship); *id.* at 1778 (claiming that Matsuda overstates a "special" or "distinct" minority legal scholarship and stigmatizes other minority scholars by claiming that minority scholars speak as "victims of racial oppression").

211. Johnson, *supra* note 207, at 2010.

212. *Id.* at 2043.

213. *Id.* at 2040, 2045-47 (explaining that on the "communalist" position, the injurer (society) rather than the individual victim is responsible for remedying injustice, and that critical race scholars believe that responsibility for solving the plight of scholars of color lies within the White male dominated academy).

214. *Id.* at 2035 (asserting that Delgado and Matsuda conflate race and socioeconomic class membership).

215. *Id.*

216. *Id.* at 2040-42 (describing "individualism" as de-emphasizing the injurer's responsibility for remedying the injury); see *id.* at 2045 (claiming that Randall Kennedy and Ste-

meritocratic.²¹⁷ He does not make claims for the entire community of racial minorities; rather, he insists that the individual voice of African American conservatives and neoconservatives be given as much weight as the voice of egalitarian progressives such as Bell, Delgado, and Matsuda.²¹⁸

This debate, as Johnson points out, contests how the minority perspective should be represented within the legal academy. However, each side embodies a perspective that has been shaped by a racial experience. Kennedy believes, as do the critical race scholars he criticizes, that racism exists,²¹⁹ and that stigmatization and the experience of "otherness" are painful to racial minorities.²²⁰ Finally, he values the distance that "outsiderness" can provide in scrutinizing majoritarian norms.²²¹

As this debate shows, what makes a minority experience distinct and a minority epistemology possible is its quality of "otherness." Marginalization and its manifestations—rejection, stigma, and individual acts of discrimination—are remembered and internalized long after the single moment or event that gave rise to the painful event passes.²²² The experience is long remembered and shapes one's consciousness. For example, Professor Stephen Carter who, like Kennedy, resists being stereotyped as a minority scholar,²²³ nonetheless, writes powerfully about the experience of discrimination.²²⁴ In turn, it is the multiplicity and commonality of alienating experiences that eventually produces a self-conscious group.²²⁵ Sharing such social

phen Carter point to scholars of color as being largely responsible for their plight in the academy).

217. *Id.* at 2036 (arguing that Randall Kennedy has adopted majoritarian standards); see Kennedy, *supra* note 208, at 707-11 (criticizing Randall Kennedy for adopting a meritocratic regime, which assumes that the individual with the greatest merit will not encounter significant racial prejudice).

218. Kennedy, *supra* note 187, at 1784 (accusing Matsuda of "slight[ing] the heterogeneity of people of color"); see *id.* ("Delgado completely overlooks the contributions of black conservative intellectuals who vigorously oppose race-based preferential treatment.").

219. *Id.* at 1767, 1787, 1794.

220. *Id.* at 1767, 1780, 1787.

221. *Id.* at 1795.

222. See Collins, *supra* note 186, at 377-78.

223. See Carter, *supra* note 208, at 31.

224. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-49 (1991) (describing the experience of attending an elite institution and having all Whites assume his inferior intellectual abilities).

225. See PAULO FREIRE & ANTONIO FAUNDEZ, LEARNING TO QUESTION: A PEDAGOGY OF LIBERATION 80-81 (Tony Coates trans., 1989) (arguing that the dominated classes within capitalist society are minimized and downgraded by a putatively national culture); YOUNG, *supra* note 186, at 27 (arguing that self-conscious groups emerge in response to the isolating nature of serialized experience).

space produces a collective of individuals who share a common sense of how they interpret the social dynamics that affect them.

Despite inhabiting a distinct social space, minorities also share in the majority's epistemology. For example, African Americans who understand that they are constantly subject to discrimination still strive for the American Dream and hold the same values in ways not significantly different from the White majority.²²⁶ Where they differ from Whites most markedly is in how they interpret the discriminatory dynamics that make their life experience substantially different from Whites.²²⁷

In sum, the concepts of "majority" and "minority" are not defined by the number of members in a group, but by the social, cultural, and political experiences of the members of the group. Because group status is based on serialized collective experiences, and because each of us belongs to multiple groups, it is clear that there will be many variations within any group, and that many of us may be part of a majority in certain contexts and part of a minority in many others. This Article makes an empirical claim. Even though majorities and minorities share a common culture and many common social experiences, minorities' continuous encounters with discrimination, stereotypes, and privilege cause them to experience social life from a radically different vantage point. It is this commonality of social experiences that gives rise to a different minority epistemology, which becomes most salient and palpable when we, as a polity, discuss issues of discrimination.

For the foreseeable future, majorities and minorities, particularly those discussed here, Whites-racial minorities, men-women, heterosexuals-gays, will continue to exist as distinct epistemological communities, albeit difficult to define, because they will continue to inhabit qualitatively different social space.²²⁸ For the foreseeable fu-

226. See HOCHSCHILD, *supra* note 131, at 57-65 (reporting data that shows that two-thirds of Whites believe in the American Dream, while one-half of African Americans do, and that the latter tend to blame themselves for failure even while recognizing the existence of racism).

227. *Id.* at 57 (contrasting the White perception that discrimination is decreasing with the Black perception that discrimination occurs often and still is increasing).

228. See Lazos Vargas, *supra* note 33, at 1563-67 (explaining the cultural and racial hierarchy constructed by the White ethnic narrative of "melting pot" assimilation by exploring psychology, social group dynamics, history, political theory, and sociology and concluding that majorities will continue to resist assimilation by racial minorities); cf. NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 5-21 (1998) (discussing the inability of America to assimilate African Americans into the mainstream as driving the phenomenon of multiculturalism). But see NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY 13-14 (2d ed.

ture we can expect that socially constructed majorities and minorities will continue to differ significantly, particularly regarding how they describe discrimination. Thus, as Parts IV and V will argue, judges would better serve the polity if they were to recognize the existing majority-minority divide and frame the divide in ways that would allow the polity to understand better this ongoing source of disagreement.

III. HOW JUDGES ARE ABLE TO ENGAGE IN EPISTEMOLOGICAL PRIVILEGING

The intergroup conflicts discussed in Part I involve confrontations between majority and minority perspectives, which, although unarticulated, appear to be inimical to each other. The Court, consciously or unconsciously, and apparently at times without necessarily recognizing the social import of its act, chooses the epistemology of the dominant group. What are the dynamics that lead judges, who are supposed to be neutral, and who we assume to act in good faith, to rely on one epistemological construct to the exclusion of others? This Part addresses this question.

A. *The Realist/CLS Critique*

Judges can consciously or unconsciously dictate outcomes by choosing the relevant social text. For example, in hindsight we can recognize that *Plessy v. Ferguson* and *Brown v. Board of Education* are paradigmatic examples of how the Court's socially positioned description of racial relations can be outcome determinative.²²⁹ With notable exceptions, judges' choices of social text tend to favor the dominant epistemology. Why?

1. *Equality as Contextual.*—Assertions of equality only have meaning when we specify what comparison we are making and why we are

1970) (describing a social dynamic among White ethnic groups of assimilation); Randall Kennedy, *How Are We Doing with Loving? Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 818 (1997) (arguing that White-Black relations are improving, as signaled by increasing intermarriage between Blacks and Whites).

229. Compare *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (refusing to invalidate de jure segregation as enforced inferiority because any stigma resulted "not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it"), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954) with *Brown*, 347 U.S. at 494-95 (finding racial segregation inherently unequal in part because of its infliction of stigmatic harms). In *Plessy* and *Brown*, the Court did not explain, justify, or support its selection of social text. In these cases, the justices inserted their own common sense of the social world, not to be manipulative, but because this common sense seemed the appropriate criterion by which to evaluate the issues of equality before them.

making it.²³⁰ In the abstract, the Equal Protection Clause appears to be an atomistic and discrete concept: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²³¹ However, the Court has never applied this textual interpretation of the Equal Protection Clause, because the analysis of equal protection claims cannot be undertaken in a vacuum.²³² We are conscious that *A* and *B* can never be treated exactly alike. To make a determination of whether *A* and *B* are treated sufficiently alike we must devise a taxonomic scheme that categorizes what differences are relevant.

2. *Judges as Socially Situated Actors.*—Judges provide the relevant context for equal protection analysis, both in terms of social text and in terms of the relevant doctrinal issues and policy concerns. Judges' own "ideology," the unstated assumptions of their common sense of the world, will shape which context judges find relevant in difficult cases.²³³ According to CLS theorists, judges are "socially constructed."²³⁴ Although judges interpret the law in good faith, they do so according to their own social experiences, which are positioned according to gender, race, class, and culture.²³⁵ Such socially posi-

230. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577-81 (1982) (arguing that equality appears to be an independent norm but in fact incorporates substantive rights); cf. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) ("The Fourteenth Amendment . . . language is prohibitory; but every prohibition implies the existence of rights . . ."), *overruled on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975).

231. U.S. CONST. amend. XIV, § 1.

232. See, e.g., *Strauder*, 100 U.S. at 306 (recognizing the prejudice and discrimination faced by recently freed slaves and concluding that enactment of the Fourteenth Amendment was necessary to protect the supposedly "equal" citizens from the abuses of the states).

233. See J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1134-38 (1991) (arguing that one of the premises of the CLS project is that judges are socially positioned and influenced by social forces that are not consciously articulated); Harris, *supra* note 172, at 749 (suggesting that CLS questions "real reality" and instead posits that "ideology is all there is"); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 522 (1986) (describing a judge's reasoning process as "both free and bound—free to deploy work in any direction but limited by the pseudo-objectivity of the rule-as-applied, which he may or may not be able to overcome").

234. See, e.g., Balkin, *supra* note 233, at 1142 (arguing that, once the social construction of the subject is assumed, the jurisprudential problems become "how undesirable forms of blindness can be avoided [as well as] the dangers . . . of determinism"). The legal realist school first advanced this proposition. See JEROME FRANK, *LAW AND THE MODERN MIND* 100-18, 137-38 (1935) (arguing that judges come to cases with biases, and that the process of judging is a manifestation of the judge's individual personality and values, concealed by the language of "compelling mechanical logic").

235. See Balkin, *supra* note 233, at 1192 (contending that a judge is "destined to see the law according to her own ideological perceptions and beliefs"); see also KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 21 (1997) (referring to

tioned ideology is the "common sense" that each of us uses to order what we perceive.²³⁶

3. *Equality as Cultural Ideology.*—Equality is an important American symbol. De Tocqueville considered equality to be the central organizing principle of American democracy, shaping morals and laws, opinions, feelings, customs, and all institutions in American society.²³⁷ De Tocqueville described democratic peoples as having a "strong and general" passion for equality that, at times, turns into "delirium."²³⁸ What de Tocqueville observed is still measured by modern pollsters. Americans overwhelmingly believe that equality before the law makes the American democratic system better than any other political system on earth.²³⁹

Because equality is a core American cultural value, judges can justify a result by claiming that it accords with equality without providing public justification for the contextual values that the judge is applying in her analysis. In this sense, the Court's statements about equality are self-legitimizing.²⁴⁰ For example, Part V.C argues that in the affirmative action cases, *City of Richmond v. J.A. Croson Co.*²⁴¹ and *Adarand Constructors, Inc. v. Peña*,²⁴² the Court supported its conclusion to apply strict scrutiny review mainly by generalized statements, anchored in cultural ideology, concerning the individualized nature of equality.²⁴³ The Court's individualistic formulation of equal protection draws its persuasive strength by reifying cultural values—individuality, neutrality, and equality—instead of analyzing them within a contemporary

a survey in which 67.6% of the judges interviewed admitted that they allow personal attitudes to affect discretionary judgments of the court).

236. This is the sense in which sociologists Prager and Rosaldo and psychologist Young-Bruehl employ the term. See *supra* note 176 (setting forth sociologists' definitions of ideology).

237. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3-11, 475-76, 643 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., Harper & Row 1966) (1835).

238. *Id.* at 475.

239. See Yankelovich, *supra* note 15, at 23-24 (reporting on polls that show Americans place a high value on having the same rules of justice apply to one and all, rich and poor, Black and White).

240. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 47 (Geoff Bennington & Brian Massumi trans., Univ. of Minnesota Press 1984) (1979) (discussing the process of self-legitimation within the context of science and the law).

241. 488 U.S. 469 (1989).

242. 515 U.S. 200 (1995).

243. See *infra* notes 593-635 and accompanying text.

social context. This reification substitutes for the exactness that public reason requires.²⁴⁴

B. *The Legal Method Allows Judges Substantial Discretion*

While CLS theorists posit that constraints upon judicial discretion are limited, positivists and legal process theorists argue that the legal method is itself a form of constraint. On this view, judges must decide difficult cases within the accepted method of the legal profession. They must cite precedent, decide cases in accord with general principles of law, and provide public justifications for their outcome.²⁴⁵ Thus, the legal method orders how judges decide cases.²⁴⁶

The reply to this argument is that the legal method affords a great deal of flexibility within its methodological constraint.²⁴⁷ Judges select the relevant frame of discussion, (re)interpret precedent, and emphasize which policy concerns matter. Accordingly, even as the legal method constrains the range of outcomes, CLS theorists' insights continue to apply. Judges can and do manipulate the legal method, either consciously or unconsciously, to produce outcomes that accord with their own epistemologies.²⁴⁸ The abstraction of the legal method, together with the apparent objectivity of law, permits judges to make ideological choices that, in conforming with the requirements of the legal method, appear to be neutral and rea-

244. See *infra* notes 610-626 and accompanying text (discussing the deficiencies of *Adarand* and *Croson* from the point of view of public reason).

245. The legal process school was concerned with providing a framework that could legitimately limit judges' wholesale discretion. This school developed theories of adjudication that emphasized the process of judging and how to arrive at reasoned and principled opinions. These theorists claimed that if judges framed the appropriate criteria, distilled objective facts, and correctly reasoned, the outcome of such processes would be neither ad hoc nor willful. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147-49, 1149-71 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959) (arguing for the application of reasoned criteria in constitutional law adjudication).

246. See Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11 (1986) (arguing that judges are "public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession"); see also Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 444 (1997) (discussing the values of the legal method).

247. See Kennedy, *supra* note 233, at 522 (demonstrating how judging is simply a process by which a judge "achieve[s] an outcome").

248. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 124-25 (1990) (arguing that the legal method constrains but that judges can manipulate outcomes).

soned.²⁴⁹ The following three subparts illustrate how judges can make such choices.

1. *Choosing Social Text Without Providing Public Justification.*—In *Washington v. Davis*, Justice White, writing for the majority, argued that Title VII's disparate impact doctrine should not be applied to the Fourteenth Amendment because this application would bring too much of the social order under judicial scrutiny.²⁵⁰ Yet Justice White did not rely on robust data for this factual conclusion but instead cited a law review article.²⁵¹ Again writing for the majority, Justice White, in *Bowers v. Hardwick*, framed the relevant legal question as whether the Constitution protects homosexual sodomy.²⁵² Both the majority opinion and Justice Burger's concurrence described an existing and historical social and moral terrain in which homosexual sodomy was condemned.²⁵³ However, this historical text is disputed.²⁵⁴ Justice White also categorically asserted that same-sex relationships cannot be viewed in the same way as heterosexual familial relationships.²⁵⁵ Yet, this "factual" assertion is based on a social and moral text held by only a portion of the polity.²⁵⁶ In both opinions, Justice White chose the relevant concerns meriting the solicitude of the Equal Protection Clause in accord with a majority perspective.

2. *Hiding Behind Institutional Prudential Concerns.*—Another way that the Court adopts a majority epistemology is through its use of the institutional competency argument. The Court is ever aware of the institutional problems posed by intergroup conflict cases. However, this concern for institutional credibility, with notable exceptions such as *Brown*, is a concern about the Court's legitimacy with the dominant group. For example, Professor Bickel has argued that in such controversial cases as *Plessy* and *Brown*, the Court should exercise "passive" virtue, and refrain from deciding cases where the outcome might be deeply against existing social and political beliefs that cannot gain

249. See *supra* note 172 (citing sources in the critical legal studies school); see also Pierre J. Schlag, *The Problem of the Subject*, 69 Tex. L. Rev. 1627, 1634 (1991) (describing American legal formalism as an effort at "depersonalization and depriving of the individual subject").

250. See *supra* notes 90-91 and accompanying text.

251. See *supra* note 90 and accompanying text.

252. See *supra* note 141 and accompanying text.

253. See *supra* notes 143, 146, 148 and accompanying text.

254. See *supra* note 147 and accompanying text.

255. See *supra* note 144 and accompanying text.

256. See Yang, *supra* note 166.

"widespread acceptance."²⁵⁷ To do otherwise would push the "rather miraculous American phenomenon of . . . judicial [review] . . . past [its] natural limits."²⁵⁸ This concern with institutional prudence cuts only one way. It always favors the majority's perspective.²⁵⁹ For example, in his *Keyes* concurrence, Justice Powell evinces concern with the overbreadth of the busing remedy and how it could intrude into areas in which the Court had traditionally exercised deference. However, such deference accounts only for the risks that the Court might incur by unsettling what the majority White population believes to be tradition and the appropriate judicial role in interfering with the realm of privacy, which in turn is affected by the majority's view of appropriate racial relations.²⁶⁰ Similarly, in *Bowers v. Hardwick*, the Court cited institutional prudence as a reason why the Court should not challenge the majority population's view that gay and lesbian private sexual activity should be criminalized.²⁶¹

Institutional prudence can serve as a shield for the Court against having to intervene in difficult epistemological confrontations between the dominant group and the minorities. A less charitable interpretation of institutional deference is that it represents judicial participation in maintaining unequal social relationships.

3. *Manipulating Doctrinal Precedent.*—Finally, the majority opinion in *Washington v. Davis* exemplifies how precedent can be interpreted to support a retrenchment of minorities' civic rights. The *Davis* majority decision does not discuss why the Court, after a decade of interpreting employment discrimination remedies expansively and aggressively,²⁶² decided to reverse a trend it had followed without hesitancy. The majority opinion holds that the broad antidiscrimination remedies available under Title VII cases would not be extended to constitutional equal protection violations. The majority opinion

257. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 56-65, 199-207, 235-43 (2d ed. 1986).

258. See *id.* at 204.

259. Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (arguing that even process theory, which attempts to protect discrete and insular minorities, presupposes "a full theory of substantive rights and values").

260. See *supra* notes 68-70 and accompanying text.

261. 478 U.S. 186, 196 (1986) ("[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. . . . We are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.").

262. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

chose to narrowly interpret a line of cases²⁶³ to stand for the proposition that racial remedies are premised on the ability of the Court to find segregative intent and that "[d]isproportionate impact . . . is not the sole touchstone."²⁶⁴ Telling is the Court's reliance on recent cases to make its argument. Post-*Brown*, these cases were ambiguous when decided, and better demonstrate the Court's struggle to establish the parameters of the antidiscrimination doctrine.²⁶⁵ Cases such as *Palmer v. Thompson*,²⁶⁶ in which a plurality of the Court let stand a local decision to keep swimming pools segregated, continue to be ambiguous. Yet, the concurring opinion purported to find in such ambiguity the precedent on which to anchor a turn toward a more restrictive interpretation of racial discrimination remedies.

C. The Court's Method of Constitutional Adjudication Obfuscates Intergroup Conflict

The Court's approach to constitutional adjudication examines intergroup relational disputes only as they arise in the context of the claimant's particular assertion of rights against another individual or entity. Virtually all such transactions involve some past violation of individual rights. The adversarial approach, particularly when taken in combination with the rights-oriented method of constitutional adjudication, causes the Court to analyze intergroup relations in an artificially limited context, as a "win-lose" struggle for rights.

1. *Bipolar Adversarialness*.—The bipolar adversarial context of constitutional litigation obliges judges to focus their analysis on the parties and the specific facts of the case at hand. Even so, judges frequently appear to be conscious that their interpretation of "individual" rights in a discrete context may have a far-ranging impact on relations between majorities and minorities. However, the bipolar structure shapes the discourse, and the Court's concern for inter-

263. *Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wright v. Rockefeller*, 376 U.S. 52 (1964)).

264. *Id.* at 242.

265. *See id.* at 239 (citing *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) to establish that *Strauder* requires a "purpose to discriminate"); *id.* at 240 (citing *Wright*, 376 U.S. at 56, 58 to establish that racial purpose is necessary to establish a gerrymandering case); *id.* (citing *Keyes*, decided three terms earlier, for the proposition that a school desegregation remedy "must ultimately be traced to a racially discriminatory purpose").

266. *Id.* at 244 and n.11 (citing *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971), and arguing that *Palmer* should not be interpreted to render legislative purpose "irrelevant in constitutional adjudication"). The Court also cited to *Wright* and *Keyes*, which were very recently decided.

group relation emerges in muted and often confusing tones. *Brown* reveals a Court aware that its decision about an issue of individual rights will affect race relations.²⁶⁷ The *Brown* opinion does not address the needs of the individual plaintiff and defendant. Instead, it appears to address both Whites and African Americans. The Court recites the abject state of African American public education since *Plessy*.²⁶⁸ This acknowledgement of educational inequality implicitly functions as a justification for the need to reassess the doctrine of separate but equal. The Court appears to intimate that the impact of *Plessy* on African American children's public school education, and the substantive disparity that it engendered between the races, was not foreseen by *Plessy*.²⁶⁹ In *Brown*, however, there is no explicit acknowledgement of the havoc wreaked by *Plessy* on race relations. Because its foundation is ambiguous, *Brown* is a weaker decision than if it had confronted post-*Plessy* race relations directly. Also, in *Washington v. Davis*, the Court's analysis implies that the Court's prior doctrinal interpretations of Title VII's burden of proof requirement, if extended for the purposes of applying the Fifth and Fourteenth Amendments, would be impracticable from a race relations standpoint. This implication appears to form the core justification for the result.²⁷⁰ Because of the bipolar structure of the litigation, the Court does not find itself obliged to address how its opinion will impact on race relations. As a result of this omission, the opinion appears to lack concern for how the legal outcome will impact racial minorities. These cases fail to articulate clearly why the Court chooses a doctrinal path that could prove harmful to majority-minority relations. Because intergroup conflict is not the central focus of these decisions, there cannot be an ongoing dialogue regarding these issues.

2. *Rights Discourse.*—The rhetoric of rights easily distorts the complexity and dynamic nature of social group relations and the interdependent nature of individuals and distinct groups within demo-

267. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 2 (1955) ("The Court knew, of course, that its judgment [in *Brown*] would have an unparalleled impact on the daily lives of a very substantial portion of the population, and that the response of many of those affected would be in varying degrees hostile.").

268. *Brown v. Board of Educ.*, 347 U.S. 483, 491 n.6 (1954) ("[I]n the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem . . .").

269. *Id.* at 491 (emphasizing that the analysis of issues involving segregation and equal protection should be based on the present status of public education because "we cannot turn the clock back to . . . when *Plessy* . . . was written").

270. See *supra* notes 90-91 and accompanying text.

cratic polities.²⁷¹ Rights rhetoric lends itself to simplistic formulations; it sacrifices nuance for absolutism, the long run for short run, and particular interests, both individual and group, over majority-minority cohesion.²⁷² Our legal, cultural, and historical traditions have led us to a construction of rights as individualistic and atomistic.²⁷³ Sociologists have argued that individualism is one of our most important cultural ideological values and forms part of the American self-image as independent and exceptional.²⁷⁴ This individualistic culture pushes us toward an individualistic understanding of rights.

The use of rights rhetoric in intergroup conflict cases results in a win-lose presentation of the issue. One group's "gain" necessarily implies "losses" for the other.²⁷⁵ When minorities seek protection against discrimination, critics rhetorically cast this claim as an assertion of "special rights."²⁷⁶

Bowers v. Hardwick is an example of how reliance on rights rhetoric can yield absolutist results that alienate majorities from minorities and vice versa. In *Bowers*, the Court framed the issue in terms of rights: Should the Due Process Clause's understanding of privacy rights be extended to protect a gay man from being arrested in his own home under a state criminal sodomy statute?²⁷⁷ This win-lose rights inquiry led to a decision that not only excluded the epistemo-

271. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14-15, 47-76 (1991) (using the term "lone rights-bearer" to criticize the law's narrow construction of an individual as an acquisitive agent without responsibilities to the community); *id.* at 47 ("The American dialect of rights talk implicitly encodes an image of the possessor of rights. His qualities, or lack of them, help to explain why our rights claims are so stark and our responsibility concepts so inconspicuous.").

272. *Id.* at 15-17, 44-46, 175-78.

273. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 27, 30-31, 145 (1985) (describing Jeffersonian republicanism in an effort to explain America's cultural tradition of individualism); GLENDON, *supra* note 271, at 18-46 (linking the Founders' Lockean understanding of property to the principle that governmental authority must be limited); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 203-76 (1990) (discussing the relation of private property to an individualistic conception of rights).

274. See generally BELLAH ET AL., *supra* note 273, at 142 (stating that individualism is at the core of the American culture and is fundamental to the American identity).

275. See GLENDON, *supra* note 271, at 9 ("[I]n its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town.").

276. See, e.g., *Romer v. Evans*, 517 U.S. 620, 626 (1996) (noting, and rejecting, Colorado's argument that Amendment 2 did no more than place gay men and lesbians in the same position as others by denying them special rights).

277. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy

logical perspective of gay men and lesbians, but further legitimized the majority's depiction of gay men and lesbians as immoral actors.²⁷⁸ The Court was troubled by the prospect of extending a right of dubious constitutional pedigree (privacy rights) to a disfavored group (gay men and lesbians) in a controversial situation (oral sodomy between gay men). Electing to interpret rights as "trumps"²⁷⁹ placed the Court in a difficult position. Should the Court grant gay men and lesbians "rights" protection for private acts of sodomy when this controversial activity had resoundingly been condemned by all fifty states?

If, instead, the Court had examined the intergroup issues using a method of constitutional adjudication in which results could be less absolutist and more tailored, perhaps *Bowers* would have been decided differently. The Court, for example, could have used a rationality ends-means review to inquire whether the stated purposes of the legislation—to further traditional values—was furthered by selectively targeting a disfavored minority.²⁸⁰ Other national supreme courts facing a similar legal issue have applied a proportionality test to determine if the state unduly burdened personal privacy rights, acknowledging that state regulation of sodomy might be permissible in other contexts.²⁸¹ The facts of *Bowers* supported a less adversarial result. Because the state statute defined sodomy in neutral terms,²⁸² the Court could have proscribed targeted prosecution of gay men.²⁸³

and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").

278. See *supra* notes 155-156 and accompanying text; see also GLENDON, *supra* note 271, at 151-55 (criticizing the Court's lack of nuance in *Bowers v. Hardwick*, and characterizing the Court's rights rhetoric as a battle between the "Yahoos and perverts"); SANDEL, *supra* note 151, at 103-05, 107 (criticizing the *Bowers* decision for its anti-communitarian aspects).

279. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

280. See *infra* Part V.A.1.

281. See *Toonen v. Australia*, U.N. Hum. Rts. Comm., 50th Sess., No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 ¶ 6.8 (1994) (finding that Tasmanian sodomy criminal statute violated Article 17 (right to privacy) of the International Human Rights Covenant because the selected enforcement of the criminal statutes was not a "proportional response to the perceived threat to the moral standards of Tasmanian society"); *Dudgeon v. United Kingdom*, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 58, 115 (1980) (interpreting Article 8 of the European Convention on Human Rights, "right to respect for private life," to invalidate a Northern Ireland prohibition on consensual homosexual acts involving persons over 21 years of age because the prohibition was not proportional to its purpose of protecting morality), *aff'd*, 4 Eur. H.R. Rep. 149 (1981).

282. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986).

283. See *Dudgeon*, 3 Eur. H.R. Rep. at 53-54, ¶¶ 94-95, 101 (finding the criminal penalties at issue "heavy" and the "absolute legal prohibition" of consensual homosexual acts a sub-

Or, the Court could have established that the selective prosecution of gay men involved in consensual sodomy was not a proportional response to the perceived threat to the State's moral standards.²⁸⁴ Instead, the Court's overbroad and unnuanced decision in *Bowers* requires gay men and lesbians to leave an important part of their humanity in the closet.²⁸⁵ From a minority position, this is a drastic constitutional position.

Rights rhetoric masks too easily the fact that, in the area of group conflict, the Court communicates important assumptions about minorities. For example, cases like *Plessy*, *Keyes*, and *Davis* express, at various levels, disregard for the fact that African Americans continue to occupy a relatively subordinate status.²⁸⁶ By ignoring or assuming away a problematic social text and a structure of systemic discrimination, the decisions communicate, implicitly or explicitly, a notion that securing minorities' (reasonable) assent to its decisions is not necessary. These cases instead ought to require an acknowledgement of the systemic majority-minority problem and then a justification as to why the Court believes adjudication cannot address those systemic harms. This approach to adjudication would serve better to resolve intergroup disagreements.

IV. A RELATIONAL FRAMEWORK: DEMOCRACY AND INCLUSION

How can intergroup conflicts be resolved in a way that both majorities and minorities perceive as legitimate? Can judges escape their epistemological precommitments? Can constitutional adjudication promote connection rather than adversity?

This Part proposes that in majority-minority conflict cases the Court should adopt a "relational" interpretive strategy.²⁸⁷ This approach incorporates the outsider critiques set forth in Parts II and III

stantial interference on private life, while at the same time acknowledging that the State could regulate morals).

284. See *Toonen v. Australia*, U.N. Hum. Rts. Comm., 50th Sess., No. 448/1992, U.N. Doc. CCPR/C/50/D/488/1992 ¶ 6.8 (1994) ("[T]he very fact that the laws are not enforced against individuals engaging in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards.").

285. See *supra* note 169.

286. See RICHARD KLUGER, *SIMPLE JUSTICE* 86 (1976) (ascribing the unleashing of Jim Crow in part to the Supreme Court's "[h]aving validated racial separation by its narrow, if popular, reading of the Civil War amendments").

287. See *supra* note 12 (explaining the "relational approaches" of Professor Minow and Professor MacNeil).

into a foundational framework that adopts the process safeguards and substantive values of a pluralist communicative democracy model.²⁸⁸

A. Foundational Values of a Pluralist Communicative Democracy

Pluralist communicative democracy, as applied to the problem of majority-minority constitutional adjudication, treats as primary the values of including all members of the polity and treating them as equal, coparticipants in constructing the fundamental values of the polity.

James Madison, in *Federalist No. 39*, emphasized inclusion of all the polity's members as fundamental to the constitution of democracy. Exclusion of significant sectors of a polity "degrade[s] . . . the republican character" of government, because "[i]t is *essential* to a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."²⁸⁹ As already argued, the problem of exclusion of minorities continues today in judicial decisions, albeit in a much more subtle and complex form than it has previously existed. The Supreme Court's failure to acknowledge, include, and engage the minority perspective effectively excludes minorities from participating in the formation of important principles upon which our society is founded.²⁹⁰

Including minorities as well as the majority in forming the polity's values ensures that all members have a stake in the polity. At social, political, economic, and communicative levels, minorities are not majorities' coequals. Yet democracy's political terms and symbols contend that minorities and majorities are coequal, coparticipants.²⁹¹ A polity's stability requires that minorities be able to believe that the

288. See *supra* note 26 and accompanying text (contrasting Rawls's model of pluralist democracy in civic republicanism).

289. THE FEDERALIST NO. 39, at 112 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

290. Accord Michelman, *supra* note 26, at 1529 (arguing that "the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups").

291. For Judith Shklar, this gap between aspiration and reality is a fundamental paradox of liberal polities. See JUDITH N. SHKLAR, ORDINARY VICES 77 (1984) (describing egalitarianism in America as a pretense that social standings are a matter of indifference); Judith N. Shklar, *Injustice, Injury and Inequality: An Introduction*, in JUSTICE AND EQUALITY HERE AND NOW 13, 32-33 (Frank S. Lucash, ed. 1986) (defending representative democracy from those who would prefer communitarian harmony, but also noting that, because excessive inequality can destroy plurality and legality, such democracy requires empathy for the marginalized). Similarly, Frank Michelman's brand of civic republicanism emphasizes the values of inclusion and citizen participation in constitutional jurisprudence. See Michelman, *supra* note 26, at 1499, 1502-03 (arguing that these values are not nostalgic but reflective of what Americans understand constitutional democracy to mean). Citing *Bowers v. Hardwick* as an example, he eschews authoritarian constitutional interpretation for a

polity's fundamental terms can fulfill their aspirations and acknowledge their sense of self. In the words of Justice Douglas:

The sense of belonging is important to man. The feeling that he is accepted and a part of the community or the nation is as important as the feeling that he is a member of a family. He does not belong if he has a second-class citizenship. When he feels he does not belong, he is not eager to assume responsibilities of citizenship. Being unanchored, he is easy prey to divisive influences that are designed to tear a nation apart or to woo it to a foreign ideology.²⁹²

John Rawls has argued that inclusion and discursive engagement of each member of the polity ensures the stability of democracy. It means that "likes" and "unlikes" strive to construct the polity's terms of their coexistence.²⁹³ In a closed political system, where no citizen or group can opt out, each member is invested in the long-term success and stability of the polity.²⁹⁴ Rawls argues further that in such a closed system each citizen and political institution has the obligation to exercise political power in a manner that autonomous agents would agree treats citizens as free and equal.²⁹⁵ This substantive fundamental requirement of meaningful inclusion and engagement ensures the social cooperation necessary for long-term stability.²⁹⁶

Under Rawls's analysis, exclusion of the minority perspective also undermines the Court's legitimacy.²⁹⁷ The Court's legitimacy in a democratic polity depends on its ability to claim that it is neutral, and

"modern context of equality of respect, liberation from ascriptive social roles, and indissoluble plurality of perspectives." *Id.* at 1526.

292. DAVID M. POTTER, *PEOPLE OF PLENTY* 105 n.8 (1954) (quoting Justice William O. Douglas).

293. See RAWLS, *LIBERALISM*, *supra* note 26, at xli (asserting that "the problem of political liberalism is to work out a political conception of political justice . . . that a plurality of reasonable doctrines . . . may endorse").

294. *Id.* at 15-28 (describing a just society as one in which members recognize a reciprocity of interests with other members, in part because there is a mutual interest in ensuring the survival of the society as a whole, and proposing as a framework the "veil of ignorance"—those principles to which rational agents would agree in advance if they did not know their subsequent social position); JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971) [hereinafter RAWLS, *JUSTICE*] (applying this framework to construct political principles).

295. RAWLS, *LIBERALISM*, *supra* note 26, at 14, 15-18.

296. *Id.* at 15-22.

297. *Cf. id.* at 137 (defining the substantive sense of legitimacy as the "exercise of political power . . . in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason"); *id.* at 428 (defining the procedural sense of legitimacy).

that it attempts in good faith to interpret principles of justice for the well-being of all social groups.²⁹⁸

Thus, the Court's failure to include and engage minority perspectives in constitutional adjudication cases means that minorities are not meaningfully included in the dialectic of formulating the substantive values of the polity, thereby threatening both the stability and the legitimacy of the institution. If the Court fails to engage minorities' epistemological framework in its dialectic process, the Court's final decisions do not appear neutral to minorities, but instead as an exercise in choosing arbitrarily competing social "truths" or moral understandings.²⁹⁹ Equally or more significantly, the Court's imposition of a majority epistemological perspective on minority members of the polity can be seen as an act of oppression.³⁰⁰

In sum, it is crucial for the Court to employ a model of "public reason" that recognizes and engages both minority and majority perspectives when it decides cases involving intergroup disputes. This approach does not require that the minority perspective prevail, but only that it be taken seriously enough to lead to a meaningful dialogue in which, through reasoned discourse, it *may* prevail. The following section elaborates on this model.

B. *The Relational Model of Public Reason*

The task of including the "other's" epistemology as coequal, and of treating the "other" as coparticipant, is difficult, and some might argue impossible, because social norms, history, economics, and social position tend to exclude the "other." To break this cultural and social bind, a revamping of legal methodology is needed.

1. *Inclusion and the Problem of the Socially Positioned Judge.*—The first step in reconstructing a more inclusive legal method is to ensure that judges do not summarily dismiss, ignore, or take as nonexistent minorities' epistemological position.

298. See *id.* at 231-40 (discussing the Supreme Court as the exemplar of public reason). For a similar interpretation of adjudicative legitimacy that arrives at a different conclusion, see POSNER, *supra* note 248, at 124-57 (reconciling the gap between law's indeterminacy and judges' need to appear neutral by arguing that law can be related to economics); see also DWORKIN, *supra* note 279, at 110-23 (proposing a model of adjudicative legitimacy similar to Rawls's, but adding a paradigmatically positivist component of judicial neutrality rooted in method).

299. RAWLS, *LIBERALISM*, *supra* note 26, at 236-37 (arguing that, as exemplars of public reason, judges cannot invoke their own morality or the ideals of morality generally, but must interpret the Constitution in light of the public conception of justice).

300. See *id.* at 137 & n.5 (noting that political power is illegitimate if not exercised in a manner that all citizens as free and equal can be expected to endorse).

a. *The Assumption of Plurality and Contestation.*—Social science research supports the proposition that if judges were aware of the multiplicity of epistemologies, they would be less likely simply to choose one social “truth” over another without discussion. Cognitive and social psychologists report that when subjects have a clearly defined evaluative structure the incidence of biased decision making decreases.³⁰¹ Anthropologists suggest that awareness of one’s cultural and social position is a necessary first step in dealing with those who are different.³⁰² A self-conscious and self-critical methodology is essential in addressing the epistemological precommitment judges face in intergroup conflict cases.

Suppose judges were to assume that the polity is pluralistic, and that any social “truth” a judge would assert in a case in which minority rights are at stake is likely to be contested.³⁰³ Under this scenario, judges would have to be conscious that other social truths and ideologies exist beside their own and would have to consciously justify their choice of which parameters to employ in making judgments about equality.³⁰⁴ The newly acquired awareness that the majority’s “truth” can be contested and de-centered can serve as a form of constraint. In the cases already critiqued, *Keyes* and *Davis*, this approach would require judges to go beyond the common law endeavor of distinguishing precedent, citing policy concerns of institutional prudence, and (re)interpreting prior holdings. In addition, judges would have to focus on whether the social facts and “truths” in these cases, social facts that “make sense” from a White perspective, had been adequately substantiated and justified from a minority perspective. While critical

301. See Gaertner & Dovidio, *supra* note 104, at 85 (analyzing and summarizing a series of social psychology experiments and concluding that “[w]hen norms are clear, bias is unlikely to occur; when norms are ambiguous or conflicting, discrimination is often exhibited”).

302. See RAYMONDE CARROLL, *CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE* 124-26 (Carol Volk trans., 1988) (urging individuals to accept that “my truth is precisely that, ‘my’ truth. . . I must become able to conceive that the ‘aberrant’ behavior that wounds me . . . may be informed . . . by the truth of the . . . other. . .”); ROSALDO, *supra* note 176, at 169 (“In discussing forms of social knowledge, both of analysts and of human actors, one must consider their social positions. What are the complexities of the speakers’s social identity? . . . Does the person speak from a position of relative dominance or relative subordination?”).

303. See RAWLS, *LIBERALISM*, *supra* note 26, at 35-40 (attempting to provide the framework for moral disagreement between free and equal participants in a polity, without destabilizing or disunifying a well-ordered society).

304. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 884 (1990) (“[I]f truth is understood as partial and contingent, each individual or group can approach its own truths with a more honest, self-critical attitude about the value and potential relevance of other truths.”); Minow, *Justice Engendered*, *supra* note 12, at 32 (arguing that judges should be aware of their unstated point of reference when judging).

theorists and social scientists have debated the possibility of transcending one's own perspective,³⁰⁵ "[t]he point is not to find the new, true perspective; the point is to strive for impartiality by admitting our partiality."³⁰⁶ Thus, the first step judges should take in deciding intergroup conflict cases is to become self-conscious and self-critical of their initial epistemological position.

b. The Tension Between Epistemological Inclusion and Universal Truth.—The relational framework's insistence on epistemological inclusion of the minority perspective has an important consequence. To include more than one epistemology also requires that we abandon the certainty that our own "truths" about the relevant social world are the universal truths³⁰⁷ and open ourselves to the possibility that the "truth" we have come to accept is contestable.³⁰⁸ The relational approach advocates that judges destabilize their own assumptions

305. Compare Stephanie M. Wildman & Margalynne Armstrong, *Concluding Thoughts on Noticing Privilege*, in PRIVILEGE REVEALED, *supra* note 106, at 177, 177-80 (advocating that Whites recognize privilege in order to create room for conversations about how to achieve goals that require systemic changes) and Flagg, *supra* note 114, at 970-73, 991-93 (arguing that it is possible to transcend one's own perspective and privilege by becoming more self-aware, self-reflective, and humble) with ROSALDO, *supra* note 176, at 169 (arguing that our own subjectivity can never be abandoned, so that inquiry requires an awareness of our own social position in light of the dynamics of relative dominance and subordination).

306. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 12, at 376; see also SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 340 (1986) (advocating that we address the "concrete other" with a concrete history, identity, and affective constitution); Minow, *Justice Engendered*, *supra* note 12, at 76 ("I conclude that I must acknowledge and struggle against my partiality by making an effort to understand your reality and what it means for my own. . . . The solution is not to adopt and cling to some new standpoint, but instead to strive to become and remain open to perspectives and claims that challenge our own.").

307. The complex question of how to determine what is the "truth" in law is not addressed here. See DENNIS PATTERSON, LAW AND TRUTH (1996). Rather, the discussion is limited to the empirical claim that majorities and minorities hold distinct social truths and differ the most about how to interpret the social dynamics that divide them. See *supra* notes 184-227 and accompanying text.

308. See MINOW, MAKING ALL THE DIFFERENCE, *supra* note 12, at 376 ("The perspective of those who are labeled 'different' . . . is a corrective lens, another partial view, not the absolute truth."); POSNER, *supra* note 248, at 460-69, 465 (arguing that pragmatism looks at legal problems with full awareness of "limitations of human knowledge, the difficulty of translations between cultures, the unattainability of 'truth,' the consequent importance of keeping diverse paths of inquiry open, [and] the dependence of inquiry on culture and social institutions"); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 106 (1995) (arguing that pluralism requires that we abandon the comfortable, self-assured—but illusory—determinacy afforded by homogeneity); see also *supra* note 302.

about social "truths" and accept a notion to which traditionalists have been hostile, relativism.³⁰⁹

The insights of postmodernism on the interrelationship between truth, knowledge, and power can help us approach this tension.³¹⁰ Postmodernists conceive of law not as a unified discourse capable of answers that are singular, stable, and "true," but as a discourse based on multiple narratives and alternative constructions of knowledge and "truth."³¹¹ Truth and knowledge cannot be isolated from a social context.³¹² Modernity's tendency to think in terms of unitary constructs and assume that there is an objective social text³¹³ permits one social group to lay claim to a putatively universal truth. In the

309. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 15-34 (1997) (attacking a hodgepodge of CRT and CLS ideas that the authors construe as "radical" multiculturalism for a variety of reasons, including anti-Semitism); Richard A. Posner, *Beyond All Reason: The Radical Assault on Truth in American Law*, *THE NEW REPUBLIC*, Oct. 13, 1997, at 40 (calling postmodernism "radical rational fringe" and critical race theory the "lunatic core").

310. See FOUCAULT, *supra* note 123.

311. This is one way to describe the many ideas and theories which we now describe as "postmodernism." For example, neopragmatists accept this distinction. See POSNER, *supra* note 248, at 466 (acknowledging that "[t]here is knowledge if not ultimate truth"). So would those who would focus on law as narrative. See Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69, 69-71 (1996) (asserting that autobiography and other forms of narrative are good methods for challenging the status quo in society and law); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (contending that narratives and storytelling are effective methods for changing the complacency of law and for minority groups to gain support and understanding from the dominant group); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608 (1994) (arguing that narrative legal scholarship, or storytelling, provides perspectives on legal issues from viewpoints that are seldom considered). But see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 840-52 (1993) (calling for objective standards to evaluate the worth of narrative scholarship). See generally GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 224-29 (1995) (arguing that "[p]ostmodernists do not deny that there can be knowledge of reality; what they deny is that we can rely on theory and language to objectively fix the meaning of reality").

312. The anthropological work cited *supra* note 302 can be viewed as postmodernist in this sense. See also Dennis Patterson, *Introduction to POSTMODERNISM AND LAW* xi, xiii-xv (Dennis Patterson ed., 1994) (arguing that the truth or falsity of any statement cannot be assessed in isolation from everything else we take to be true).

313. The proposition advanced is not the profound skepticism about any universal claim. This is another way in which to interpret postmodernism. See, e.g., PATTERSON, *supra* note 307, at 160-61 ("[P]ostmodernist conceptions of the word-world relation see the modernist picture of propositional, representationalist truth as unintelligible; a project that never gets off the ground." (citation omitted)); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xxvi (1982) (setting forth reasons why "truth," as a correspondence between language and facts, is not objective). The claim made here, that minorities have a distinct social epistemology, can be viewed as an empirical claim rather than a claim based on profound skepticism. See *supra* notes 184-227 and accompanying text.

postmodernist view, truth is a manifestation of social power;³¹⁴ unitary "truth" must be regarded with skepticism.³¹⁵ To avoid hegemonic constructions, postmodernism accepts a plurality of intermediate and tentative positions, sometimes inassimilable and divergent.³¹⁶ Postmodernism teaches to *avoid* "essentializing";³¹⁷ to be wary of categories that exclude modes of thinking and relationships that are valid and important;³¹⁸ to eschew dichotomies that hide the range of possibilities in between polar extremes;³¹⁹ to "locate the subject" so that we do not come inexorably to "logical" conclusions that lend false authority to our own value judgments and epistemological process.³²⁰ Thus, we must avoid imbuing with heightened authority what may be only our own perspective.

Can judges deal with the proposition that social truth is relative and yet interpret the law, without losing themselves in the sea of nihilism? The attempt to answer this question is what Professor Gary Minda has recently called the postmodern project.³²¹ A number of scholars argue that "postmodernism" cultivates a plurality of perspectives that can coexist with a commitment to finding interpretations of the law that reflect central political values.³²² As Anna Yeatman ex-

314. See Michel Foucault, *Afterword* to HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 212 (2d ed. 1983) (discussing how discursive practices, such as law and medicine, constitute a "form of power [that] applies itself to immediate everyday life"); Winter, *supra* note 177, at 742.

315. Cf. Bartlett, *supra* note 304, at 884 ("[P]ositionality . . . makes clear that current disagreements within society at large and among feminists . . . reflect value conflicts basic to the terms of social existence. If resolvable at all, these conflicts will not be settled by reference to external or pre-social standards of truth.").

316. See JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, JUST GAMING 94-95 (Wlad Godzich trans., 1985) (discussing the postmodern view of language games, which replace totality with diversity and critique political judgment by attending to divergent notions of justice); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

317. See *supra* note 206 and accompanying text.

318. See *supra* note 207 and accompanying text.

319. See, e.g., Crenshaw, *supra* note 130, at 1373-74 (discussing the bipolar categories applied to Whites and African Americans); Halley, *supra* note 145, at 1748-50 (discussing the bipolar identity and conduct categories applied to gay men and lesbians).

320. See Schlag, *supra* note 249, at 1646-56 (discussing how American legal formalism invokes a transcendental subject that conceals the function of particular interpretive communities).

321. MINDA, *supra* note 311, at 243-57; see also DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY AND LAW 20-34 (1997) (identifying the postmodern legal project as addressing the gap between outsider perspectives and the perspective of internal legal actors).

322. See Hayman, *supra* note 308, at 106 (arguing that postmodernism's exposure of the myth of a unifying tradition can lay the groundwork for a genuine unity premised on mutual respect); Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1192 (1992) (describing postmodernism as an attempt to account for experience without reducing it to an authoritative source of knowledge).

plains, "[t]he project of developing the norms and institutions of a universal culture of individualized agency is a coherent project. It is one which situates . . . plurality . . . within a democratic ethic."³²³

This interpretation views law as a process in which judges of good faith struggle with multiple perspectives, yet avoid those errors that arise as a result of assuming that their socially positioned perspective is the exclusively relevant social truth.³²⁴ Judges' search for "truths" should reinforce the polity's democratic values, not the judge's epistemological precommitments. If a judge must choose an epistemological perspective, he should do so consciously, provide justification to the group whose epistemology is being confronted, and demonstrate how the decision furthers the polity's values.

This model and its social text, of course, are themselves subject to the very arguments set forth in this Part. Some "truths" must be selected in every model to avoid foundational nihilism. Part IV.A proposed "truths" founded in a framework of pluralist communicative democracy and based on principles of inclusion and equal coparticipation. Applying the approach of public reason, the rest of this Article sets forth reasons why this framework, even if not the ultimate "truth," best solves the majority-minority epistemological conflict problem discussed in Part I.

2. *Using a Relational Concept of Public Reason to Engage Opposing Epistemologies as Coequal.*—This Article does not advocate that judges *accept* a minority perspective, but only that they engage and address it. Thus, judges must provide an explanation, or "public reason," for their choice to adopt a particular epistemology. This Part proposes that Rawls's concept of public reason be part of the legal method judges apply to majority-minority conflict cases. The proposed model of public reason would require judges to: (a) justify their key choices of text, doctrine, and policy in terms the "other" might reasonably accept; (b) communicate that epistemological differences in perspec-

323. Anna Yeatman, *A Feminist Theory of Social Differentiation*, in *FEMINISM/POSTMODERNISM* 281, 290 (Linda J. Nicholson ed., 1990).

324. A number of scholars view the judge as an actor engaged in a good faith struggle searching for justice. See MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 12, at 376-77 (suggesting that judges struggle in good faith against partiality); POSNER, *supra* note 248, at 460-69 (claiming that the judge seeks knowledge with the goal of justice in mind); cf. Bartlett, *supra* note 304, at 884 (arguing that there are no fixed, discoverable foundations, but also that we can grasp the significance of positional meaning through a self-critical stance); Seyla Benhabib, *Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard*, in *FEMINISM/POSTMODERNISM*, *supra* note 323, at 107, 125 (arguing that minimal criteria of validity for discursive and political practices are possible despite the absence of foundational guarantees).

tives are reasonable and have an equal place in the political dialogue; (c) refrain from imposing epistemological frameworks on any group; and (d) seek to justify decisions to both majorities and minorities on narrow, mutually acceptable common grounds.

a. Providing a Justification the "Other" Might Reasonably Accept.—A key concept of the pluralist model of communicative democracy is that public deliberation should be constrained by an ethic which Rawls refers to as reciprocity.³²⁵ In such a democracy, participants would not impose a particular "comprehensive doctrine"³²⁶ on one another. Instead, we would justify our actions by giving reasons the "other" will understand and reasonably accept.³²⁷ Reciprocity helps mediate strong disagreement among participants who hold numerous "comprehensive doctrines" because these participants are similarly motivated by mutual regard to want to justify their actions by reasons the "other" will understand and reasonably accept.³²⁸ Each participant attempts to understand that other coparticipants' political views are formed by their experiences.³²⁹ The epistemological and philosophical position of each member is respected, because this is what we would expect for ourselves. Respecting the integrity of each person's deeply held beliefs as well as "ways of knowing" means that no participant is coerced into accepting ways of knowing or moral frameworks.³³⁰ This ensures a baseline of coequality that provides the necessary minimum conditions for long term stability.³³¹

325. RAWLS, *LIBERALISM*, *supra* note 26, at 49-50 (defining "reciprocity" as a willingness to accept reasonable principles of fair cooperation and grounding this concept in our desire for a social world in which such cooperation is possible).

326. Rawls's term "comprehensive doctrines" is somewhat similar to the sense of "epistemology" that Parts I and II have developed. *See id.* at 13, 36-37 (defining a "comprehensive doctrine" as one covering all recognized values and virtues within a precisely articulated system and noting that such doctrines are not simply a product of class interest, but a product of free practical reason, so that liberalism must address them).

327. *Id.* at xlv; *see also* GUTMANN & THOMPSON, *supra* note 26, at 55 ("When citizens deliberate, they seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons.").

328. *See* RAWLS, *LIBERALISM*, *supra* note 26, at 137; *see also* GUTMANN & THOMPSON, *supra* note 26, at 73 ("A deliberative disagreement is one in which citizens continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable.").

329. *See supra* note 326.

330. *Cf.* RAWLS, *LIBERALISM*, *supra* note 26, at 49 ("Persons are reasonable . . . [when] they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them.").

331. *See id.* at 15-18 (discussing "the fundamental organizing idea of justice as fairness" as the source of stability).

How would Rawls's concept of "reciprocity" constrain public reason in intergroup conflict cases? First, judges would test their conclusions by determining whether those who lose in the adjudication can reasonably accept the judges' proffered justification. The attempt to justify decisions to the losing group obliges judges to imagine the other's perspective and interests, to consider the impact of their decisions on that group, and to assess whether the court's proffered justification is sufficiently persuasive and reasoned to appear "neutral" and rational to that "other." Reciprocity would require judges to imagine and counter the arguments that a hypothetical dissenter might make.³³²

Second, reciprocity also serves a moderating function.³³³ Part I argued that in cases like *Bowers* and *Keyes*, the affected minority would not have accepted the Court's outcome because it entirely excluded their perspective and implicitly denied the validity of minority groups' social experience.³³⁴ Had the Court asked itself whether gay men and lesbians or African American parents could reasonably accept the decision, the Court might have reconsidered and perhaps moderated the tenor and the reasoning of its decisions.³³⁵ Such moderation would have been feasible.

332. Actual dissents may not suffice for this purpose because they may be premised on the same world view as the majority opinion. Compare *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (refusing to adopt the minority homosexual perspective that statutes prohibiting sodomy violate the fundamental rights of those engaging in homosexual activity) with *id.* at 214-20 (Stevens, J., dissenting) (also failing to adopt the minority homosexual perspective). Cf. HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 220 (1961) (discussing the process of judging as an "anticipated communication with others with whom I know I must finally come to some agreement"). This kind of reasoned engagement is distinct from what humanist empathy proponents propose, namely, "projecting oneself into the other's place as subject of her experience." DAVID WOODRUFF SMITH, *THE CIRCLE OF ACQUAINTANCE: PERCEPTION, CONSCIOUSNESS, AND EMPATHY* 112 (1989). See generally Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) (setting forth a definition of empathy); Matsuda, *supra* note 187, at 324 ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice."); Shklar, *supra* note 291, at 32-33 (discussing Rawls's thought and arguing that a claim of right is an appeal for "rational empathy").

333. See GUTMANN & THOMPSON, *supra* note 26, at 79 (describing mutual respect as requiring "a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees"); MACEDO, *supra* note 26, at 71 (arguing that we moderate our claims in the face of reasonable claims of others).

334. See *supra* notes 131-137, 138-171 and accompanying text.

335. "Splitting the difference" would not always be appropriate in majority-minority conflict cases because "reasonable people will continue to disagree and moral perspectives will remain divergent." See MACEDO, *supra* note 26, at 71. The Court remains responsible for deciding these cases in a manner that ensures that the democratic process is not thwarted by irrational majority-minority dynamics. See *infra* Part IV.C.2.

Third, reciprocity would help the Court to be more persuasive in a polity made up of diverse communities with distinct epistemologies. Where the Court at least recognizes and addresses alternative viewpoints it is more likely to win the support of members of the minority as well as the majority community. Decisions in which the Court does not even consider minorities' epistemology are not persuasive and are exclusionary in the deepest sense.³³⁶

b. Communicating That Epistemological Divergence Is Reasonable.—Rawls's model elaborates how members of a pluralistic democratic polity can handle confrontation between epistemologies that cannot be reconciled. His concept of reciprocity suggests that public reason requires decision makers to credit the reasonableness of those whose epistemologies we may not understand.³³⁷

Reciprocity requires judges to move beyond tolerance and recognize distinct epistemologies as equally reasonable.³³⁸ They must reject the impatient view, held by many who believe in a universal truth, that those who have a different epistemology from that held by the majority simply "don't get it,"³³⁹ are disunifying the polity,³⁴⁰ are undermining our cultural values and traditions,³⁴¹ or lack civic virtue.³⁴²

Judges must also reject the view that an idea is unacceptable simply because of the identity or social position of its author. If social ideology dictates *ex ante* that one speaker is inherently inferior, then it is less likely the Court will engage the speaker's perspective.³⁴³ This

336. See *supra* Part I.

337. RAWLS, *LIBERALISM*, *supra* note 26, at li.

338. See MACEDO, *supra* note 26, at 70 ("Achieving a common moral framework allows us to express in politics our common reasonableness, it allows us, in effect, mutually to recognize one another as equally reasonable moral beings.").

339. RAWLS, *LIBERALISM*, *supra* note 26, at 61 ("[T]hose who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs . . .").

340. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 74, 96-99, 112-18 (1992) (criticizing multiculturalism in education on the basis that it undermines American traditions and disunifies the polity).

341. See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 28-34 (1987) (arguing that cultural relativism is incompatible with the natural rights foundation of the American Constitution); PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 9, 137-201 (1995) (arguing that the inflow of "third world" immigrants threatens America's economy, culture, public health, and environment).

342. This could be the implication of the civic republicans' emphasis on deliberation as a way of learning civic virtue that ultimately leads to a formulation of the public good. Cf. Sunstein, *supra* note 26, at 1554-55 (arguing that "[r]epublican theories . . . rely on the deliberative functions of politics and on practical reason, and embrace the notion of the common good as a coherent one" (footnote omitted)).

343. Cf. ARISTOTLE, *RHETORIC* 25 (W. Rhys Roberts trans., Random House, Inc. 1954) ("It is not true . . . that the personal goodness revealed by the speaker contributes nothing

failure to engage minority epistemology is yet another form of exclusion. For example, in the race relations cases discussed in Part I.A, the Court's implicit adoption of the White viewpoint as universal excluded the opposing perspective of African American parents.³⁴⁴

It is important for judges to recognize that differences between majorities and minorities are reasonable disagreements and not matters of "right" and "wrong." Not only does this increase minority acceptance of the courts' own decisions, it also facilitates debate about moral and political issues in the community. As will be discussed in Part IV.C, courts' handling of these issues has a tremendous influence on the discussion of majority-minority conflicts throughout the polity.

c. Refraining from Imposing Epistemological Frameworks.—Once we recognize epistemological difference as part of the polity's permanent social context, we must also accept that multiple reasonable positions must find room for coexistence.³⁴⁵ Unity and agreement cannot be attained with respect to an epistemological confrontation unless one either assumes away the problem by pretending that the polity is homogeneous or ignores the existence of another epistemological view.³⁴⁶ Insisting on agreement would imply, at some level, coercion of those who are in the weaker political position.³⁴⁷ Because the majority will dominate political processes and can define what the polity accepts as the "common sense" of the social world, majorities are in a position to tell those in politically and socially powerless positions

to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.").

344. See *supra* notes 55-77 and accompanying text (discussing *Keyes's* single focus in the context of busing); *supra* notes 78-100 and accompanying text (discussing *Davis's* adoption of a White perspective of racial discrimination).

345. GUTMANN & THOMPSON, *supra* note 26, at 92 ("A deliberative perspective . . . must reject the unqualified quest for agreement because it must renounce the claim to comprehensiveness."); MACEDO, *supra* note 26, at 71 ("Moderation allows us to accept the fact that a large and diverse group of reasonable people will never completely unite on precisely the same moral platform."); Michelman, *supra* note 26, at 1528-29 ("The legal form of plurality is indeterminacy . . . the precondition of the dialogic, critical-transformative dimension of our legal practice . . .").

346. See generally Lazos Vargas, *supra* note 33 (discussing the pervasive effects of the assumption of homogeneity in how the Court fails to address adequately majority-minority conflicts).

347. The critics of civic republicanism make this point most cogently. See, e.g., Bell & Bansal, *supra* note 26, at 1611 (arguing that the republican view has historically suppressed the needs of Blacks in America "in order to promote the common good of whites"); Gey, *supra* note 26, at 870-72 (setting forth the republican argument for the political correction of improper attitudes); Sullivan, *supra* note 26, at 1722 (noting the tension between the republican enterprise and acceptance of heterogeneous groups with incommensurable values).

what the "truth" is. As previously argued, however, Rawls's concept of freedom and coequality means that no epistemological framework should be imposed upon dissenters, be they majorities or minorities, lest such an imposition undermine the legitimacy of state power.³⁴⁸

The task of judges, therefore, is to find doctrinal resolutions that both majorities and minorities can "reasonably accept." The following section spells out how judges can do so.

d. Seeking to Justify Decisions on Narrow Mutually Acceptable Common Ground.—To accommodate widespread reasonable disagreement, judges should attempt to render narrow decisions that do not require them to choose one group's view of the world over that of another group.³⁴⁹ Requiring judges to apply the constraints of reciprocity and to issue narrow decisions in intergroup conflict cases leaves key aspects of our method of constitutional adjudication intact and even reinforces it. Professor Sunstein has argued that constitutional adjudication reflects a process akin to "overlapping consensus" because it is pragmatic, reaches solutions incrementally, and allows judges to solve problems in a highly particularized factual and doctrinal context.³⁵⁰ Constitutional adjudication maintains its integrity and coherence because judges decide cases discretely and do not always reach for broad theoretical statements that may not reflect what the entire polity agrees are its fundamental values.³⁵¹ In constitutional

348. See *supra* notes 293-296 and accompanying text.

349. RAWLS, *LIBERALISM*, *supra* note 26, at 164-68 (discussing the concept of "overlapping consensus" as a discrete and prudential process of developing narrow bands of agreement); *id.* at 150 (arguing against the adoption or rejection of any comprehensive doctrine in favor of consensus established through the public political culture). Other theorists also have advocated such an approach to resolving disputes in the polity at large. See BARBER, *supra* note 26, at 170 ("[S]trong democracy embodies . . . openness and flexibility [T]he objective is to find working maxims rather than fixed truths and shared consciousness. . . ."); GUTMANN & THOMPSON, *supra* note 26, at 85-93 (discussing the concept of "economy of moral disagreement" as a process of encouraging citizens to discover what aspects of their first-order moral beliefs could be accepted as principles and policies by other citizens with whom they fundamentally disagree, so that citizens may achieve a second-order agreement); MACEDO, *supra* note 26, at 70 (arguing that, instead of striking a balance between comprehensive moral doctrines, we should put these aside in favor of mutually acceptable common ground); Michelman, *supra* note 26, at 1529 ("[P]olitical freedom through law depends on 'our' constant reach for inclusion of the other . . .").

350. SUNSTEIN, *supra* note 35, at 37, 52.

351. This sounds like Professor Bickel's theory of "passive virtue." See *supra* note 257 and accompanying text. However, the relational approach distinguishes itself from Bickel's vision by requiring the Court to engage the perspective of the "other" as a precondition to adopting a prudential stance. The approach also advocates that as part of setting the parameters of dialogic exchange, the Court ensure that the majority not abuse its superior numbers and dominant social and political position.

law there are what Professor Sunstein calls "incompletely theorized agreements,"³⁵² which form practical agreement on particular outcomes, despite having diverse theories as to why the outcome is correct, or even no articulate theory at all.³⁵³ Equal protection, given its complexity and subtlety, may lend itself more than most constitutional issues to incompletely theorized agreements.³⁵⁴

Sunstein further argues that, with respect to very divisive issues, when agreement within the polity is not possible, it is prudent for courts to defer final determination until the polity has had an opportunity to flush out ideas and positions.³⁵⁵ The Court can then reconsider the issue when it is "ripe,"³⁵⁶ or resolve difficult cases on narrower grounds. This would leave the court and the polity free to be able to work out areas of principled commonality.³⁵⁷ Attempts to formulate high level abstractions about principles of justice should be avoided until substantial consensus has been formed within the polity.³⁵⁸ For example, Part III.C suggested that *Bowers v. Hardwick* should have been decided on narrower grounds, applying principles of proportionality and discretion, as did the high courts of Great Britain and Tasmania when confronted with the same issue.³⁵⁹ Part I.A similarly argued that the resolution of *Keyes* and *Davis* unnecessarily overreached by unduly limiting constitutionally cognizable discrimination.³⁶⁰

It may not always be possible for a court to issue a narrow decision that avoids an epistemological choice. There will be cases, not as clear cut as those discussed in Part I, in which mutually acceptable

352. SUNSTEIN, *supra* note 35, at 5.

353. *Id.* at 7, 14-16, 35-37; *see id.* at 37 ("What I am emphasizing . . . is that when people diverge on some (relatively) high-level proposition, they might be able to agree when they lower the level of abstraction. Incompletely theorized judgments on particular cases are the ordinary material of law.").

354. *Cf. id.* at 37 ("High-level theories are rarely reflected explicitly in law.").

355. *Id.* at 17-18, 42 (noting that the law focuses on specific judgments rather than general principles, and that it is not the Supreme Court's job "to offer a fully theorized conception of equality"); *see also* BICKEL, *supra* note 257, at 28, 239-43.

356. SUNSTEIN, *supra* note 35, at 41-44.

357. *Id.* at 41-46.

358. For Sunstein this is an issue regarding the legitimacy of the function of judicial review. *See id.* at 47 ("A special goal of the incompletely theorized agreement on particulars is to obtain a consensus on a concrete outcome among people who do not want to decide questions in political philosophy."); *id.* at 53 ("For reasons of both policy and principle, the development of large-scale theories of the right and the good is a democratic task, not a judicial one."). This is Professor Bickel's concern as well. *See* Bickel, *supra* note 257, at 236-37.

359. *See supra* notes 281-284 and accompanying text.

360. *See supra* notes 55-61 and accompanying text.

ground may not be attainable. The goal then should be “understanding” in Professor Iris Marion Young’s sense of the term.³⁶¹ Professor Young argues that deliberative politics should increase the ability of majorities and minorities to understand what divides them.³⁶² This position acknowledges that socially situated actors cannot overcome their own social position, but advocates that they should seek to “spea[k] across differences of culture, social position, and need, . . . so that other social positions learn . . . that there remains more behind that [other’s] experience and perspective that transcends their own subjectivity.”³⁶³

This concept of narrow decisions is admittedly a substantive constraint, which can be as subjective as other “constraints” in other constitutional adjudicative frameworks. Specifically, the model requires judges to determine what should be “reasonably acceptable” to both majorities and minorities in the context of what judges understand to be the fundamental values of the polity. Judges must also determine which issues are constitutionally essential, which substantive values are fundamental to the polity, and ensure that these determinations are inclusive and bound by the principle of reciprocity. The following section argues that judges are capable of this endeavor.

3. *It Is Feasible for Reason and Rationality to Bridge the Epistemological Gap.*—Many might question the framework that has been proposed, asserting that it places too much reliance on reason and rationality.³⁶⁴ Specifically, critics might charge that judges who are socially positioned will not, despite their best efforts, be able to understand or articulate the epistemological position of the “other.” Such a critique must be taken very seriously. Feminist critics of democracy have argued convincingly that those who are on opposite sides of the epistemological divide are radically limited in their ability to interpret

361. See YOUNG, *supra* note 186, at 68 (defining “understanding” as speaking across differences without collapsing these differences in an act of mutual identification).

362. See *id.* (arguing that communicative democracy is better conceived as “[u]nderstanding another social location”).

363. *Id.*

364. Rawls’s emphasis on reason and rationality has been criticized, and the workability of the process of overlapping consensus has been questioned. See, e.g., Gary C. Leedes, *Rawls’s Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083, 1091-95 (1993) (commenting that Rawls’s account of reasonableness does not adequately explain peoples’ motivation to endorse the “justice as fairness” principle); see also Heidi M. Hurd, *The Levitation of Liberalism*, 105 YALE L.J. 795 (1995) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)) (concluding that Rawls’s piece fails to motivate individuals to understand “justice as fairness” because his argument either “levitates liberalism” beyond the group of both “internalists and externalists,” or it “exceeds the grasp of people who do not already hold such a belief”).

and understand the perspective of the "other."³⁶⁵ They have explained that minority perspectives are often dismissed and excluded because, from a majority perspective, they do not appear rational or reasoned, or because the majority hears assent when the response is dissent. For example, Jane Mansbridge argues that, from a male-gendered view of rationality, women's ways of communicating on political issues can be viewed as unduly emotive and therefore not worthy of engagement.³⁶⁶ Professor Lynn Sanders emphasizes that persons in lower status positions are not as likely to be heard.³⁶⁷

This challenge to judges' ability to engage in the reasoned elaboration proposed in this Article can be answered at many levels. First, social science data reveals some reason to be optimistic that judges of good faith, even if they are majority group members, will be able to translate and understand minority perspectives. The sociological data show that majorities and minorities share core democratic values that could form the basis for establishing basic guidelines of coexistence.³⁶⁸ At first glance, therefore, it would seem that mutual assent as to discrete core norms might be achievable. Admittedly, however, the issues around which majorities and minorities are most likely to disagree are volatile, difficult to handle, and can easily lead to unreasonable, defensive behavior that accentuates exclusionary tactics. These issues include disagreements centered on issues of discrimination and fair treatment.³⁶⁹

Even recognizing this difficulty, social and psychological studies suggest the plausibility of a relational model. In their study of Arab-

365. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POST-SOCIALIST" CONDITION* 83 (1997) (arguing that democratic participation requires speaking in one's own voice, and that any "translation" corrupts the voice of subordinated minorities); Jane Mansbridge, *Feminism and Democratic Community*, in *DEMOCRATIC COMMUNITY* 339, 358 (Nomos No. XXXV, John W. Chapman & Ian Shapiro eds., 1993) (advocating that democratic community must develop beyond the restrictive dichotomy of "reason/emotion" or "male/female" and develop sympathetic capacities as part of civic education); Lynn M. Sanders, *Against Deliberation*, 25 *POL. THEORY* 347, 349 (1997) (arguing that certain citizens are "less likely than others to be listened to [and] . . . when this disregard is systematically associated with the arguments made by those we know already to be systematically disadvantaged, we should at least reevaluate our assumptions about deliberation's democratic potential").

366. See Jane Mansbridge, *Feminism and Democracy*, *AM. PROSPECT*, Spring 1990, at 126, 127 ("Subordinate groups sometimes cannot find the right voice or words to express their thoughts, and when they do, they discover they are not heard. . . . [They] are silenced, encouraged to keep their wants inchoate, and heard to say 'yes' when they mean 'no.'").

367. See Sanders, *supra* note 365, at 366-69.

368. See *supra* notes 226-227 and accompanying text (discussing Jennifer Hochschild's analysis of shared cultural values).

369. See *supra* Part I (discussing conflicting majority and minority experiences of racism).

Jewish conflict, socio-psychologists Amir and Ben-Ari suggest that in cases where distinct groups who are committed to a multicultural model cannot agree on principles of coexistence, norms at a macrosocial level could help to subdue intergroup hostility.³⁷⁰ Courts could provide an avenue to bridge intergroup relations by setting reasoned norms that help groups hostile to each other to look beyond their immediate differences.³⁷¹ At a micro-level, intergroup studies indicate that hostile groups engaged in joint problem-solving can decrease mutual hostility and succeed in creating limited joint cooperation.³⁷² Finally, micro studies conducted in educational settings indicate that when majorities actually contend with minorities' viewpoints and perspectives, they consider more carefully the impact of their decisions on these groups.³⁷³

A second response to the feasibility critique is that the Supreme Court, through certain of its opinions, has already revealed it is capable of understanding and articulating minority viewpoints. For example, *Brown* can be interpreted as a case in which the Court took the lead in articulating the perspective of African Americans with respect to segregation.³⁷⁴ *Brown* inserted into equal protection dialogue the issue of how racial segregation stigmatized African Americans and ar-

370. Yehuda Amir & Rachel Ben-Ari, *Enhancing Intergroup Relations in Israel: A Differential Approach*, in STEREOTYPING AND PREJUDICE: CHANGING CONCEPTIONS 243, 243-57 (Daniel Bar-Tal et al. eds., 1989).

371. See JOHN DUCKITT, THE SOCIAL PSYCHOLOGY OF PREJUDICE 254 (1992) (suggesting that a constitution can mitigate interethnic conflicts by channeling political tensions along less volatile cleavages, and citing the Nigerian constitution of 1979 as an example); cf. Cynthia T. García Coll & Heidie A. Vázquez García, *Development Processes and Their Influence on Interethnic and Interracial Relations*, in TOWARD A COMMON DESTINY: IMPROVING RACE AND ETHNIC RELATIONS IN AMERICA 103, 114 (Willis D. Hawley & Anthony W. Jackson eds., 1995) ("[T]he task for any particular group is to move from ethnocentric thought to a more pluralistic worldview in which the perspectives of other racial and ethnic groups can be understood and accepted, and not be considered a threat to either the group or the individual.").

372. See DAVID W. JOHNSON & ROGER J. JOHNSON, COOPERATION AND COMPETITION: THEORY AND RESEARCH 166 (1989) (reporting similar results in research centering on Minnesota schools); see generally COOPERATIVE LEARNING: THEORY AND RESEARCH (Shlomo Sharan ed., 1990) (collecting articles that describe a number of learning strategies that permitted teachers to structure situations in which mixed ethnic children cooperated with each other).

373. Cf. Heather C. Hill, *The Importance of a Minority Perspective in the Classroom*, CHRON. HIGHER EDUC., Nov. 7, 1997, at A60 (reporting that the lack of minorities in her political science class room produced student comments that were much more hostile to the interests of racial minorities). See generally Beverly Daniel Tatum, *Talking about Race, Learning about Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1 (1992) (reporting on the inclusion of race-related content in courses and on methods of reducing college students' resistance to learning about race-related issues).

374. See *supra* notes 34-35, 43-44 and accompanying text.

ticated that this was a reasonable position, not merely "in the heads" of African Americans.³⁷⁵ Where *Plessy* had previously been outrageously dismissive of African Americans' epistemological position that racial segregation caused substantial stigmatic harms, the *Brown* Court raised this issue to the level of constitutional significance.³⁷⁶ The most notable contribution of *Brown* therefore may not have been doctrinal, but rather how the Court depicted African Americans' social identity as equal coparticipants. To a notable extent, the Court also has successfully understood the minority perspective of both gay men and lesbians and women in certain of its opinions.³⁷⁷

The feasibility critique has a great deal of validity. Many socially positioned judges, despite their good faith and vigorous effort, may find it impossible to "translate" minority epistemology as they function within a highly authoritative and hegemonic legal system. To some degree we can attempt to solve this problem by focusing on the appropriate selection of judges. In selecting judges, we should emphasize the ability to understand and communicate minority perspectives.³⁷⁸ This call for epistemological diversity is not exclusively a call for the appointment of more minority judges. Not all judges who are minority group members are necessarily capable of understanding minority perspectives.³⁷⁹ Moreover, some majority members may demonstrate a particular skill at being self-critical and open to other perspectives,

375. See Henderson, *supra* note 332, at 1593 (arguing that *Brown* "illustrates the existence of empathic understanding in the Supreme Court"). *Brown* also illustrates how the rational coequal engagement advocated here is frequently similar to human empathy.

376. See *supra* notes 37-44 and accompanying text.

377. See *infra* Parts V.A & V.B.1.

378. Not surprisingly, a judge's race appears to be a highly relevant factor in this respect. A complex survey of federal judges measured salient differences according to the judges' race regarding issues that might be said to measure the ability of the judge to engage the "other." See Lyles, *supra* note 235, at 223-42. Only 18% of African American respondent-judges agreed that Black litigants are treated fairly in the justice system, while 83% of White judges agreed that Black litigants are treated fairly by the justice system. See *id.* at 237-38. Moreover, African Americans and Latinos shared a common overall cynicism in the political process. For instance, 47% of African Americans and 47% of Latinos surveyed agreed that court judges' confirmations are too "political," and 78% of African Americans and 79% of Latinos believed partisan politics dominate and control district court appointments. See *id.* at 231. In addition, 47% of African Americans responded that they believed a few big interests run the government; only 18% of Whites held this belief. See *id.* at 242. In contrast, there was only a slight variance on these issues between male and female respondents. See *id.* at 263.

379. Whether it is cause or effect, those minority group members who rise to a "pinna-
cle" such as the Supreme Court may often be persons who have been acculturated to the
majority perspective. See *supra* notes 198-203 and accompanying text (discussing the dy-
namics that might account for this phenomenon).

because of their disposition, training, and education.³⁸⁰ However, it will often be true that members of a particular minority group will be better able to understand the viewpoint of that particular group because they will have experienced the subordinate social and cultural context upon which that viewpoint is founded.³⁸¹ Amicus briefs by public interest groups and others can also help the Court to understand the minority perspective in constitutional adjudication.³⁸²

Finally, even to the extent that judges are currently not capable of understanding and articulating minority perspectives, the very purpose of this Article is to work out a framework that can help judges overcome these limitations. This Article seeks to describe the method a judge should follow to be more inclusive and to further the goals of participatory democracy. The task of interpreting and presenting to the polity the minority epistemological position may be daunting, but the importance of the task is also immense. If judges can understand the dynamics of epistemological divergence, they can write opinions that help to connect majorities and minorities and avoid exacerbating the adversarialness that is a product of the current method of constitutional adjudication. Such opinions may also facilitate communication between majorities and minorities in the polity at large.

C. *The Court's Role in Furthering Majority-Minority Discourse in the Polity At Large*

Part IV.B has described a model of public reason which ensures that the Court's decisions in intergroup conflict cases engage the minority perspective. This Part discusses another crucial role the Court must play in mediating intergroup conflicts. The Court must help to facilitate majority-minority discourse in the legislative and executive branches of government, as well as within the polity at large.

1. *The Role of the Court and the Polity in Formulating Constitutional Principles.*—There are three principal reasons why it is critical that majority-minority discourse be facilitated throughout the polity. First,

380. For example, some of the best work in antidiscrimination law and CRT has been authored by White legal scholars. See, e.g., MINOW, MAKING ALL THE DIFFERENCE, *supra* note 12; WILDMAN ET AL., *supra* note 106; Brest, *supra* note 36; Colker, *supra* note 39; Fiss, *supra* note 39; Freeman, *supra* note 42; Karst, *supra* note 39. This is not, by any means, an exhaustive list.

381. See *supra* notes 184-187, 378 and accompanying text.

382. See James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 381 (1997) (concluding that courts utilize information provided by amicus curiae briefs only when the briefs focus on the issues set forth by the parties).

there is the issue of legitimacy. In a democratic polity, all political power ultimately comes from the people.³⁸³ Judges do not decide for the polity what its constitutional values should be; instead, the polity as a whole, through other deliberative processes, determines its values.³⁸⁴ Judges must not obstruct resolution of what are essentially political issues to be made by the polity.³⁸⁵ For Rawls, judges' (substantive) legitimacy lies in their being able to reflect, within a reasonable range, the fundamental values of the polity.³⁸⁶ Thus, under this model, a dialectical process must take place between "we the people" and the judiciary, as both bodies jointly endeavor to give meaning to the Constitution.³⁸⁷

383. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that the United States governmental scheme is a "dualist democracy" in which constitutional authority resides with "we the people"); RAWLS, *LIBERALISM*, *supra* note 26, at 231 & n.12 (agreeing with Ackerman's "we the people" theory and arguing that the Court is the highest judicial interpreter but not the final interpreter of the people's will); Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1161 (1997) (urging that the polity should determine controversial constitutional issues, such as abortion, right-to-die, and freedom of religion); see also Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 659-67 (1994) (discussing Rawls's constitutional theory). This Article emphasizes that the Court's legitimacy depends on its ability to be and appear neutral in intergroup conflict cases to both majorities and minorities, by reconciling pluralism and democratic coequality.

384. See 1 ACKERMAN, *supra* note 383, at 139, 262-64 ("It is not the special province of the judges to lead the People onward and upward to new and higher values. This is the task of citizens who may, after the investment of great energy, succeed (or fail) in gaining the considered assent of a majority of their fellows."); RAWLS, *LIBERALISM*, *supra* note 26, at 232 ("Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people."); SUNSTEIN, *supra* note 35, at 53 (arguing that legitimacy resides in achieving the polity's assent to controversial judicial decisions).

385. Rawls and Sunstein can claim an antiauthoritarian position because they also envision a society that can coexist without necessarily agreeing about fundamental principles of justice. See RAWLS, *LIBERALISM*, *supra* note 26, at 35-37; SUNSTEIN, *supra* note 35, at 35-61 (arguing, in light of his account of "incompletely theorized agreements," for judicial circumspection with respect to areas where there is not yet a consensus in the polity).

386. Rawls explains:

[J]ustices cannot, of course, invoke their own personal morality . . . [nor] their or other people's religious or philosophical views. . . . Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception [of justice as fairness] and its political values of justice and public reason. . . . These are values . . . that all citizens as reasonable and rational might reasonably be expected to endorse.

RAWLS, *LIBERALISM*, *supra* note 26, at 236; see also Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 144-45 (1997) (applying Rawls's argument to justify the Court's antimajoritarian role). Bickel's concern with legitimacy arose from his observation that the Court was an institutionally weak player that could not command obedience to constitutional norms out of sync with the values of the majority. See BICKEL, *supra* note 257, at 244-72.

387. This is the core proposal of Bruce Ackerman's "we the people" model. See 1 ACKERMAN, *supra* note 383, at 139, 159-62, 262-65. As discussed in Part IV.C.2.a, *infra*, the model

Second, there is the relationship between the normative function of law and democracy. Ultimately, the polity itself is responsible for setting out the terms of coexistence.³⁸⁸ In a pluralist democracy, the Court's pronouncements of norms of coexistence, which can generate a high level of majoritarian resentment, must become accepted by a significant portion of the majority in order for these norms to have any meaning. Judges can educate, mandate, and attempt to proselytize. But their articulation of values remains only *written* law if the polity fails to view these norms as reflecting their own understanding of the polity's constitutional values. The polity's individual participants must also accept these interpretations for the Court's pronouncements to become law, i.e., norms that reflect the polity's commitment to a certain vision of the Constitution.³⁸⁹

Third, there is the issue of multiple epistemologies and how these relate to a polity's search for constitutional values. In a pluralistic political environment,³⁹⁰ where multiple perspectives contend and must coexist in tension, resolution of majority-minority confrontations must be tentative and ongoing.³⁹¹ The centralization of this task in one institution, courts, and one set of actors, judges, would undermine the democratic commitment to inclusion. Such a system would be biased because it would favor the judiciary's understanding of truth and constitutional values over the understanding of other groups. In light of the current method by which we select judges, confidence that they can overcome their epistemological commitments by the method presented here or any other method may very well be unwarranted.³⁹² In sum, it is unwise to trust only one institution to carry the burden of an ongoing process of finding those values that a diverse citizenry can reasonably accept.

proposed here also emphasizes that the Court has a principal role to play in setting basic minimum safeguards that would protect minorities.

388. See RAWLS, *LIBERALISM*, *supra* note 26, at 431 (arguing that political authority derives from citizens themselves, who are thus responsible for the enactments and legislation of all institutional procedures, and that the principle of justice as fairness is substantive in nature).

389. See Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 6-9 (1983) (arguing that society's norms balance legal concepts with reality to create a legal tradition).

390. See *supra* Parts II, IV.

391. MINOW, *MAKING ALL THE DIFFERENCE*, *supra* note 12, at 383 (arguing that, in dealing with problems of difference, "[t]here is no ultimate resting place but instead an opportunity for dialogue, conversation, continuing processes of mutual boundary setting, and efforts to manage colliding perspectives on reality").

392. See *supra* Part IV.B.3; see also Fallon, *supra* note 386, at 148-49 (arguing that the Court may not be sensitive to the "diverse and fluid public moral sensibilities" because the current Court is "dominated by lawyers and academics of generally narrower experience").

2. *The Role of the Court in Facilitating the Discussion of Majority-Minority Issues.*—

a. *Setting Parameters for the Discussion.*—In order to facilitate the polity's discourse in the area of majority-minority interaction, the Court must set certain limits on this discourse to prevent the majority from dominating, to the point of oppression, minority groups or their interests. The Court is the democratic institution best positioned to undertake this function. First, the Court has great cultural, and some argue moral, authority in setting forth what are to be the fundamental constitutional values of the polity.³⁹³ Second, the Court, protected from the political fray, is in a better position to take the long-term view.³⁹⁴ The Court sets these parameters by using two familiar devices: process theory and rights.

(1) *Process Theory.*—Professor John Hart Ely's process theory³⁹⁵ begins from the position that the democratic process does not always produce reasoned results. Democratic politics is subject to capture by majoritarian interest groups whose motivations may not be aligned with the values of the polity as a whole.³⁹⁶ From a sociological standpoint, socio-psychologists might explain that majorities use their power to favor members of majorities like themselves,³⁹⁷ or that inter-group dynamics lead members of the majority to view minority groups as competitors.³⁹⁸ Professor Ely observes that representatives do not

393. See RAWLS, *LIBERALISM*, *supra* note 26, at 237 (discussing the Court's ability to give public reason vitality within the public forum).

394. See BICKEL, *supra* note 257, at 23-38 (arguing that questions of principle are more likely to be at the forefront of judicial deliberations, as opposed to political processes that appear erratic and given to excess, and that courts take the long term view).

395. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). This Article discusses only that aspect of Ely's theory which explains why certain minorities may sometimes be excluded from the political process, and which argues that their rights must therefore be protected. For a critique of the more complete and controversial version of his theory, see Tribe, *supra* note 259, at 1064 (arguing that the "process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values"). See also *supra* note 245.

396. Rawls supports process review. See RAWLS, *LIBERALISM*, *supra* note 26, at 239 (discussing the court's role of "forc[ing] political discussion to take a principled form").

397. See generally Lazos Vargas, *supra* note 33, at 1567-68 (discussing the various dynamics that divide majorities and minorities).

398. See Brest, *supra* note 36, at 8 (explaining that preferences for members of our own racial group "may also result from a desire to enhance our own power and esteem by enhancing the power and esteem of members of groups to which we belong" as well as "from our tendency to sympathize most readily with those who seem most like ourselves"); Lazos Vargas, *supra* note 33, at 1569 (describing that, under certain conditions, competition arises for limited resources because "each group constitutes a real threat to the other,

always represent minorities' interests, because majorities lack empathetic understanding, or because they are hostile or prejudiced.³⁹⁹ Such dynamics "'provid[e] the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralist society.'"⁴⁰⁰ Citing to *Carolene Products* footnote four,⁴⁰¹ Professor Ely argues that judicial review is appropriate wherever the Court might deem there is prejudice against discrete and insular minorities.⁴⁰²

Process theory is "participation-oriented, [and] representation-reinforcing" because the Court ensures that the democratic process represents all members of the polity, not just the majority.⁴⁰³ According to Ely, the function of the Equal Protection Clause is to ensure that majorities do not unduly abridge political rights of minorities.⁴⁰⁴ Minorities, even with an unfettered right to vote, might not have the leverage necessary to be part of a political marketplace in which they would be able to "stri[k]e deals" with other groups to protect their

because they are directly competing in a zero-sum game"). See generally DUCKITT, *supra* note 371, at 96-109 (discussing the premise of Realistic Conflict Theory that prejudice is a result of relationships between groups that involve real conflicts of interest).

399. See ELY, *supra* note 395, at 81 (explaining the transition to stronger centralized government as due in part to the recognition that "the existing constitutional devices for protecting minorities were simply not sufficient[,] and that neither a finite list of entitlements nor mechanisms of pluralism suffice to eliminate 'all the ways majorities can tyrannize minorities'").

400. *Id.* at 153 (quoting Goodman, *supra* note 90, at 315).

401. *Id.* The famous footnote 4 states:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[]: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted).

402. ELY, *supra* note 395, at 77 (explaining that such judicial review "focus[es] not on whether this or that substantive value is unusually important or fundamental, but rather on . . . processes by which values are appropriately identified and accommodated").

403. *Id.* at 87.

404. *Id.* at 82.

own interests.⁴⁰⁵ Thus, process theory can be interpreted broadly to require that judges protect minorities' rights to participate in the political process.⁴⁰⁶

(2) *Rights as Checks on "Majority Wins" Democracy.*⁴⁰⁷—While the Court must allow the polity to engage in a robust discussion of majority-minority issues, it must also step in at critical moments to ensure that minorities are not excluded from this discussion. The Court uses "rights" as well as process theory to play this protective role. That is, rights not only reinforce the democratic process but also ensure substantive legitimacy⁴⁰⁸ and enforce the basic liberalism of the polity.⁴⁰⁹ In protecting minority rights the Court often employs various forms of antidiscrimination doctrine.⁴¹⁰ While courts and scholars continue to debate the correct form of such doctrine, all of the versions serve the purpose discussed in this section: protecting majority-minority relations within the polity.

Certainly a tension exists between the Court's role as definer of rights and its role as supporter and facilitator of robust debate in the polity. While the Court must be a sufficient protector of rights for minorities to take part in moral and political debate in the polity, it must not issue decisions that truncate the polity's own discussion of important moral, political, and epistemological issues. However, this does not mean the Court should back off from its role as a protector of rights. In fact, if the Court were to adopt a broader understanding of rights, minorities would be more protected than they are now.⁴¹¹

405. *Id.* at 135.

406. *Id.* at 152-59.

407. "Majority wins" is but one version of democracy. See, e.g., THE FEDERALIST NO. 10 (James Madison) (noting that even a majority of the whole can constitute a faction that is adverse to the interests of the whole); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (discussing the problem of minority representation within contemporary politics).

408. See RAWLS, LIBERALISM, *supra* note 26, at 137 (discussing the substantive principle of legitimacy as the exercise of political power in accord with a constitution whose essentials all citizens as free and equal can reasonably be expected to endorse).

409. See DWORKIN, *supra* note 279, at 184-205 (arguing that in a democratic system in which majorities by definition rule, minorities must be able to maintain faith that the political system will treat them as equals).

410. See *supra* notes 34-100 and accompanying text (discussing the Court's application of forms of antidiscrimination doctrine).

411. See GLENDON, *supra* note 271, at 44-46, 171-83 (arguing for a "fuller concept" of human potential that recognizes our ability to be reasonable and recognize complexity); KARST, *supra* note 42, at 42 (arguing that constitutional adjudication should take into account the history of exclusion in order to reinforce the individualism and egalitarianism that are "central to the larger group identity of the American nation"); Charles R. Lawrence III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L.

Although the relational framework would not foreclose such a project,⁴¹² it instead emphasizes the importance of the construction of rights in influencing majority-minority political coexistence. The Court may reconcile its two important roles with respect to minority rights by providing an example to the polity of how to address minority-majority issues most appropriately.

b. Leading by Example.—Judges play an educative role.⁴¹³ Particularly in highly contested areas, such as majority-minority conflict, the Court is a cultural and institutional key participant in shaping political dialogue.⁴¹⁴ Judges interpret minority identity in their adjudication of majority-minority conflict cases.⁴¹⁵ These cases present the Court with the opportunity to play a positive role by educating the majority, by teaching it that a minority perspective, being based on a distinct and subordinate social space, may represent more than a mere disagreement of opinion. Judges can present a narrative of minorities' worthiness and reasonableness that provides a counterimage to a social reality in which minorities inhabit relatively subordinate social space.⁴¹⁶

On the other hand, constitutional discourse can maintain and legitimize the social framework in which minorities hold a negative social identity. Where judges fail to address, or explicitly reaffirm, the dynamic of subordination, the result will be greater political and social distance between majorities and minorities. Majorities will feel

REV. 819, 824 (1995) (discussing race as a "substantive societal condition" as well as an "individual right to be treated without reference to one's race as primary"); Mari J. Matsuda, *Voices of America: Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1390 (1991) (arguing that public law should recognize the right of people "to be what they are," and that certain aspects of cultural identity, such as accent and language, should be subject to protection under antidiscrimination and equal protection law).

412. Critical race theorists are among those who remain the most committed to continuing and reconstructing discourse on rights because the latter have been an important avenue for minorities to seek fundamental changes in the way political power is distributed. See Crenshaw, *supra* note 130, at 1357-58 (arguing that rights are helpful to Black aspirations and combat a hostile racial environment).

413. See RAWLS, LIBERALISM, *supra* note 26, at 237 ("[T]he court's role as exemplar of public reason . . . give[s] public reason vividness and vitality in the public forum.").

414. See *id.* at 224-36 (arguing that the Court has no inherent authority in interpreting constitutional values, but that its authority depends on its ability to persuade by following the strictures of public reason and to approximate the values of the polity).

415. Cf. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 12, at 383 (describing rights litigation as an opportunity "for describing and remaking patterns of relationships").

416. See Cover, *supra* note 389, at 9 (discussing the use of narrative in law to envision alternatives to existing affairs).

justified in looking down at minorities as "others" who do not fit some version of the universal norm.

The judges' task, therefore, is to address the minority perspective in a manner that ensures its recognition in the broader polity. In negative terms, the Court must endeavor to ensure that minority identity is not so stigmatized that judges or majorities cannot conceive of engaging their perspective. This is a primary task of antidiscrimination doctrine.⁴¹⁷ In positive terms the Court should interpret the role of minorities as coequal participants in the polity. This is the task of both process theory and judges' public reason.⁴¹⁸

Judges, through the exercise of public reason, provide a model for majorities and minorities alike as to how those who would appear to be inextricably at odds can engage in reasoned discourse. The Court's minority-identity narratives establish for the polity "paradigms for behavior,"⁴¹⁹ namely, a willingness to engage the other viewpoint and to tolerate disagreement between reasonable opponents. The successful application of public reasoning in *Brown* demonstrates that majority-minority equality is an achievable goal.⁴²⁰

c. Refraining from Truncating the Polity's Discussion.—As discussed above, judges appropriately intervene in the democratic process in order to hold in check harmful majority-minority dynamics. Judges can, however, unduly preempt necessary majority-minority political dialogue that should take place in other political discursive spheres.⁴²¹

Where the stakes in a dispute do not infringe on the constitutional minimums needed to safeguard coequality,⁴²² and the context does not require immediate resolution of a majority-minority conflict,⁴²³ the nature of the disagreement can be viewed as political. In these cases, judges should endeavor to ensure that political disagreements be resolved through other discursive spheres rather than through the courts. For example, in *Bowers v. Hardwick*,⁴²⁴ the Court could have narrowly overturned the State's selective prosecution of

417. See *supra* notes 34-100 and accompanying text.

418. See *supra* notes 393-396, 405-406 and accompanying text; *supra* Part IV.B.

419. Cover, *supra* note 389, at 9.

420. See *supra* text accompanying notes 374-376.

421. Cf. Sunstein, *supra* note 383, at 1150 (citing *Roe* as a possible example of the proposition that "judicial judgments may truncate ongoing processes of democratic deliberation").

422. See *supra* notes 395-406 (discussing process theory as a means to safeguard coequality).

423. See *supra* Part IV.C.2.a.

424. 478 U.S. 186 (1986).

gay men under criminal statutes, and still have left unresolved the political issue of how to accommodate private conduct of an unpopular lifestyle in the face of majority sentiment that this conduct undermines traditional values.⁴²⁵ In this role, the Court's work is to ensure that the political dialogue takes place on a level discursive field in which majorities and minorities can deliberate about volatile issues as coequal citizens.

V. THE RELATIONAL FRAMEWORK AS APPLIED TO RECENT MAJORITY-MINORITY CONFLICT CASES

The following Part applies the relational framework to three recent decisions that will be significant in the Court's development of majority-minority relations jurisprudence. These cases deal with discrimination on the basis of sexual preference, gender, and race.

A. *Romer v. Evans: Majority Targeting of a Minority—and Democracy*

*Romer v. Evans*⁴²⁶ is a remarkable case in many respects. Although the Court did not use the language of majority-minority conflict, the dynamic of the majority targeting of minorities drives this decision. At issue was the validity of Amendment 2, passed by referendum as an amendment to the Colorado State Constitution in 1992. Amendment 2 provided as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁴²⁷

Characterizing Amendment 2 as "unprecedented in our jurisprudence,"⁴²⁸ "imposing a broad and undifferentiated disability on a single named group,"⁴²⁹ of "sheer breadth . . . so discontinuous[.]"⁴³⁰

425. See *supra* notes 280-285 and accompanying text; text accompanying notes 408-410.

426. 517 U.S. 620 (1996).

427. *Id.* at 624.

428. *Id.* at 633.

429. *Id.* at 632.

430. *Id.*

and containing overly "broad language,"⁴³¹ the Court struck it down. Justice Kennedy's majority opinion opened by citing the *Plessy* dissent for the proposition that the Equal Protection Clause does not "tolerate classes among citizens."⁴³² The Court held that Amendment 2 singled out gay men and lesbians as a "solitary class" because it prevented them from petitioning their local government and state legislature for legislation barring discrimination.⁴³³ The Court noted that Amendment 2 would strike down local ordinances, including one in Boulder that prohibited a retail store from denying services to gay men and lesbians,⁴³⁴ and another in Denver that prohibited restaurants, theaters, and other common carriers from denying services to gay men and lesbians.⁴³⁵

The Court also found Amendment 2 to be overbroad because its scope reached both transactions in the private sphere, such as in the sale of real estate, and laws and policies, including those specific prohibitions against discrimination against gay men and lesbians, and perhaps even general laws and policies prohibiting arbitrary discrimination in governmental and private settings.⁴³⁶ Administrative decisions, such as a police department's decision to crack down on physical gay bashing,⁴³⁷ could be subject to the proscription of the Amendment. At the very least, such actions might be discouraged given the additional administrative burden of determining whether in such a case "homosexuality is an arbitrary and, thus, forbidden basis for decision."⁴³⁸

431. *Id.* at 630.

432. *Id.* at 623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

433. *See id.* at 627 (concluding that the Colorado electorate imposed an absolute legal disability on gay men and lesbians alone by "withdr[awing] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination").

434. *Id.* at 628-29.

435. *Id.* at 623-24. The Court discussed the origin of such local statutes. *See id.* at 627-28 (noting that "[t]he common law rules [of antidiscrimination by providers of public accommodations] . . . proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination[,] so that, "[i]n consequence, most States have chosen . . . [to] enact[] detailed statutory schemes").

436. *Id.* at 629-30.

437. Compare Oral Argument of Pet'rs, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available in 1995 WL 605822, at *27 (questioning whether Amendment 2 would prohibit this police policy) with *Romer*, 517 U.S. at 644-45 (Scalia, J., dissenting) (arguing that the Court's portrayal of Coloradans as given to hate-filled gay-bashing is false, and that any animus against homosexuals consists simply of the view that their conduct is reprehensible). This debate as to the significance of antigay sentiment is part of a legitimate majority-minority cultural debate.

438. *Romer*, 517 U.S. at 630.

Justice Kennedy concluded that Amendment 2 can have no legitimate state purpose. “[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁴³⁹ If no identifiable legitimate purpose can be found, the Equal Protection Clause prohibits “‘a bare . . . desire to harm a politically unpopular group.’”⁴⁴⁰ Accordingly, Amendment 2 failed under the Court’s minimal level of scrutiny because the State did not establish a legitimate purpose.⁴⁴¹

Romer v. Evans makes several points that demonstrate how the relational framework, at various levels, already reflects the Court’s analytical approach. The discussion below also suggests that the relational framework could help us to understand why, at other levels, the Court’s analysis is not satisfactory.

1. *Who Is a Minority?*—An often-raised objection to the proposal that the Equal Protection Clause applies to intergroup conflict is “how would judges identify minorities?”⁴⁴² The use of the term “minority,” “class,” or “protected group” implies that there are stable characteristics, and that we can determine which of these are relevant to a majority-minority conflict analysis. The approach advocated here is contextual, because the relational framework is concerned with the social dynamics between majorities and minorities.⁴⁴³ In each case, the court should determine whether a social group is a “minority” by looking to whether the social, political, or cultural context subjects it to a dynamic of subordination. Status is relevant because what may

439. *Id.* at 634.

440. *Id.* (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

441. *Id.* at 631-32 (“[W]e will uphold the legislative classification so long as it bears a rational basis to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry.” (citation omitted)). Commentators have provided various explanations as to whether the standard of review applied in *Romer* was actually the minimal scrutiny that the Court claimed to have applied. See, e.g., Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 329-34 (1997) (describing “purpose scrutiny” as a search for illegitimate purposes that leads to automatic invalidation, and describing the issue in *Romer* as whether the purpose of “animus” is prohibited per se or only against a protected class); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 264 (1996) (explaining that the Court’s invocation of minimal scrutiny was an accurate description of the level of review, and that the unique aspect in *Romer* was that the majority “single[d] out a group for pariah status”); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996) (connecting *Romer* with *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and describing these cases as using “rationality review ‘with bite’ when prejudice and hostility are especially likely to be present”).

442. See Oral Argument of Pet’rs, *supra* note 437, at *24 (posing the hypothetical of whether blue-eyed people could be considered minorities).

443. See *supra* notes 184-228 and accompanying text; Part IV.A.

trigger majority animosity, prejudice, or opprobrium is a visible difference, such as a physical characteristic or a mode of behavior—for instance, atypical gender mannerisms. In addition, the Court should take into account history (such as a history of stigmatization in the case of segregation and racial minorities), cultural ideology (a “common sense” that places a group in an inferior or restrictive role), and psychology (a documented showing that the majority regards the minority as inferior or subordinate to them in some respect). The nature of the inquiry will vary with context because different minority groups are subject to different kinds of prejudices and power dynamics. Thus, to answer the hypothetical mentioned above, it is unlikely that blue-eyed people ever would be regarded as a minority because our history, cultural ideology, and psychology do not indicate that any majority might want to discriminate against this group.

The Court applied this sort of analysis concerning minorities in *Romer v. Evans*. The Court’s review of the purpose of Amendment 2 was not triggered by the status of gay men and lesbians because homosexuality is not a protected class.⁴⁴⁴ Instead, the Court’s scrutiny was based on concern that Amendment 2 reflected an intent to subordinate a minority group.⁴⁴⁵ By describing Amendment 2 as a referendum that singled out an “unpopular” group⁴⁴⁶ for a “far-reaching”⁴⁴⁷ disadvantage, the Court properly situated Amendment 2 within its social context. This approach was not outcome determinative, but properly served as a background against which the Court scrutinized the rationality of the legislative action.

While the Court asserted that it was applying rational basis review,⁴⁴⁸ its inquiry can also be characterized, in terms of process theory, as an attempt to determine whether the political process had been used to target an unpopular minority.⁴⁴⁹ The Court determined that the majority used its superior voting power to impose a perma-

444. See *Romer*, 517 U.S. at 631 (asserting that Amendment 2 is invalid because it takes away from homosexuals rights that others either have or may seek without restraint, but failing to refer to homosexuals as a protected class).

445. Compare *id.* at 633 (demonstrating that Amendment 2 denied equal protection of the law for only one group of citizens) with *id.* at 634 (referring to homosexuals as a “politically unpopular group” (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))).

446. *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

447. *Id.* at 627.

448. *Id.* at 631-32.

449. See *supra* text accompanying notes 405-406; Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities vote on Minorities' Democratic Citizenship*, 61 OHIO ST. L.J. (forthcoming 1999) (detailing this aspect of *Romer v. Evans*).

ment citizenship disadvantage on a disfavored social group.⁴⁵⁰ This action did not promote the fundamental values of the polity, because the only value promoted was intergroup animus. Under the relational framework, this is precisely the kind of negative majority dynamic targeted at minorities that the Court has a clear obligation to invalidate.

2. *Results That the "Other" Might Reasonably Accept.*—*Romer v. Evans*'s greatest weakness as an application of the relational framework is its failure to address majorities' obvious concerns with whether the decision fetters their ability to legislate cultural values. This concern arises because the Court does not reconcile *Romer* with *Bowers v. Hardwick*'s⁴⁵¹ holding that the majority can criminalize gay and lesbian sexual conduct.⁴⁵² By not acknowledging or engaging the majorities' position,⁴⁵³ *Romer* does not accord with the relational framework's construction of public reason.⁴⁵⁴

The Court also failed to educate. The Court's method, to search out a legitimate purpose in the enactment of the referendum,⁴⁵⁵ obfuscates what should be the substantive concern. In a majority-minority conflict case, the important issue is the dynamics at work between majorities and minorities. The Court found inappropriate dynamics,

450. *Romer*, 517 U.S. at 634-36; see Lazos Vargas, *supra* note 449 (setting forth a test that ensures democratic co-participation and inclusion of minorities in cases where majorities can diminish minorities' democratic citizenship).

451. 478 U.S. 186 (1986); see *supra* notes 138-171 and accompanying text.

452. See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts . . . *Bowers v. Hardwick*." (citation omitted)). Failure to reconcile these cases has generated uncertainty as to how *Romer* should be interpreted. See, e.g., Marc A. Fajer, *Bowers v. Hardwick, Romer v. Evans, and the Meaning of Anti-Discrimination Legislation*, 2 NAT'L J. SEXUAL ORIENTATION L. 208, 211 (1996) <<http://sunsite.unc.edu/gaylaw>> (arguing that *Bowers* did not apply in *Romer* because, contrary to Justice Scalia's dissenting opinion, *Romer* dealt with a denial on the basis of the status of basic civil rights accorded members of the polity); Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 386 (1997) (arguing that *Romer* overrules *Bowers v. Hardwick* because these cases are inconsistent); Halley, *supra* note 139, at 440-41 (suggesting that *Romer* is not dependent on the special status of gay men and lesbians as a despised class, but on a majority selecting out a group, which could just as well have been "blondes or burglars," for "feudal" treatment). Indications are that lower courts will have differing views in how to interpret these cases. See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 295-96 (6th Cir. 1997) (arguing that *Romer* does not apply to Cincinnati city ordinance, although the ordinance contains language very similar to Amendment 2), *cert. denied*, 119 S. Ct. 365 (1998).

453. By the term "majority," this Article does not mean all heterosexuals, but the dominant view that gay men and lesbians do not deserve a place as coequals in the polity.

454. See *supra* Part IV.B.

455. See *Romer*, 517 U.S. at 635-36 (discussing the state's asserted purpose in Amendment 2).

but it explained the majority-minority conflict in conclusory terms: (1) Amendment 2 is unusual; (2) therefore the "inevitable" inference is that the majority enacted the Amendment out of "animosity."⁴⁵⁶ An analysis in accord with the relational framework would explain why the manner in which Amendment 2 operated was contrary to constitutional values. Amendment 2 is inappropriate because the majority makes use of the political process, "majority wins" politics, to deny gay men and lesbians a fundamental aspect of citizenship in the polity, namely, the ability of any person to petition its government for antidiscrimination protection.⁴⁵⁷ This is a form of exclusion from the polity that the democratic concept of coequality and coparticipation does not tolerate. Had the Court expressed itself more clearly as to what it regarded as "out of bounds" in the majority-minority dynamic, it would have better performed its educative function, and perhaps been more persuasive.

3. *Negative Social Identity and Its Effect on Discursive Dynamics.*— From the perspective of the relational framework, Justice Scalia's dissent⁴⁵⁸ illustrates an important consequence that results from the majority's unwillingness to reconcile *Romer* with *Hardwick*.⁴⁵⁹ It leaves in place *Hardwick*'s legitimization of homosexuals' negative social identity.

Justice Scalia rejected the Court's finding that the majority in Colorado had impermissibly targeted gay men and lesbians on the basis that *Hardwick* resolved the issue.⁴⁶⁰ Justice Scalia argued that majorities should be able to determine the polity's moral values,⁴⁶¹ a proposition that would permit the majority to exclude gay men and lesbians from important areas of public association.⁴⁶² *Hardwick*'s generalized identity finding, that gay men and lesbians are not the majority's social coequals, permits Justice Scalia to resort to tired and discredited

456. See *id.* at 634; *supra* notes 439-440 and accompanying text.

457. For further detail on process analyses of *Romer*, see Lazos Vargas, *supra* note 449; Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361 (1997) (exploring democratic citizenship aspects of *Romer*).

458. See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (stating his disfavor with the majority's refusal to follow *Bowers v. Hardwick*).

459. See *supra* notes 451-452 and accompanying text.

460. Justice Scalia rhetorically made this point by beginning his dissent with the following sentence: "The Court has mistaken a Kulturkampf for a fit of spite." *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

461. *Id.* at 645, 648.

462. *Id.* at 642, 652-53 ("If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct.").

negative stereotypes of gay men and lesbians, and to argue that the majority's cultural value judgment had a rational basis.⁴⁶³ He analogized gay men and lesbians with convicted criminals, polygamists, and persons who are cruel to animals.⁴⁶⁴ Justice Scalia further asserted that homosexuals have disproportionately great political power and disposable income.⁴⁶⁵ He argued that the majority should be able to combat such an "influential" interest group by employing measures such as Amendment 2.⁴⁶⁶

Justice Scalia's dissent is dismissive of this minority's epistemology and reinforces a negative dynamic of stereotypes that is not only inaccurate, but demeaning. His use of the very stereotypes that the majority irrationally relies on to target gay men and lesbians legitimizes the attitudes that impede majority-minority coequal democratic engagement. What gay men and lesbians *experience* in their daily lives is not a privileged political position or inordinately high income, but instead constant awareness, in the form of fear and apprehension, that they can always be the targets of the majority's opprobrium.⁴⁶⁷ For the gay and lesbian community, random acts of life-threatening violence are a danger against which any prudent member of this minority group must take precautions.⁴⁶⁸ Freedom from discrimination and degradation on the job and in transacting services essential to normal modern life can never be taken for granted.⁴⁶⁹ The effort of the Amendment's opponents to gain the majorities' endorsement that such discrimination does not reflect the values of a local political community is not, as Justice Scalia argued, interest group politics as usual,⁴⁷⁰ or elitist,⁴⁷¹

463. *See id.* at 640-43.

464. *Id.* at 644.

465. *Id.* at 645-46, 647, 652. The only cited support for Justice Scalia's "facts" is an affidavit in the referendum proponents' trial record. *Id.* at 645.

466. *Id.* at 645-47.

467. *See Fajer, supra* note 452, at 209 (contending that under Amendment 2 homosexuals would no longer be protected with regard to jobs, housing, and public accommodations).

468. *See supra* note 156 and accompanying text.

469. *See Fajer, supra* note 452, at 208 (noting that discrimination is more immediate to the lives of gay men and lesbians than is the ability of states to criminalize sodomy as upheld in *Bowers*); *see also* *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997) (en banc) (upholding the right of an employer to fire an employee on the basis of her sexual orientation), *cert. denied*, 118 S. Ct. 693 (1998).

470. *See Romer*, 517 U.S. at 646 (Scalia, J., dissenting) ("[Homosexuals] possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving . . . full social acceptance[] of homosexuality.").

471. *See id.* at 652-53 (accusing the majority of taking part in the "culture war" and imposing the values of the "lawyer class" on "the more plebeian attitudes that apparently still prevail in the United States Congress").

but instead part of an evolutionary political and discursive process that promotes a truly inclusive and representative democracy.⁴⁷² This is a vision of the Fourteenth Amendment that the majority endorsed when it invoked Justice Harlan's *Plessy* dissent, calling for a Constitution that "neither knows nor tolerates classes among citizens."⁴⁷³

B. *Mississippi University for Women v. Hogan and United States v. Virginia: Explicating the Social Dynamics of Minority Stereotypes*

Part IV.C.2.b argued that the Court plays an educative role in majority-minority relations. The judge's role is to set the dialectical framework that enables majorities to engage minorities as equal coparticipants. Critics might argue that judges are not social scientists, and that they lack the ability to assume this educative function. Admittedly, Part II described the interpretation of minority experience and identification of minority epistemology as a complex task. The model of minority epistemology put forward acknowledges that there is no single minority identity, only a wide band of common experiences that are subject to a wide array of interpretations.

Nonetheless, this subpart contends that the Supreme Court has already demonstrated it is up to the challenge. In the area of antidiscrimination doctrine, specifically gender stereotypes, the Court has shown it has the ability to engage minority perspectives. Two cases, *Mississippi University for Women v. Hogan*⁴⁷⁴ and *United States v. Virginia (VMI)*,⁴⁷⁵ have developed the link between women's social identity and how the legitimization of stereotypes can result in discrimination against women. In these decisions, Justices O'Connor and Ginsburg, writing for the respective majorities in *Hogan* and *VMI*, explicate the relationship between gender stereotypes, single-sex education, and discrimination.

1. *Social Text and Majority-Minority Dynamics.*—In *Hogan*, the Court invalidated the Mississippi University for Women (MUW) female-only nursing program. The majority found that the female-only

472. See *supra* Part IV.C.1 (discussing the role of the relational majority-minority framework in achieving such a democracy); see also YANG, *supra* note 166, at 21 (noting that polls capture increasing tolerance of gay men and lesbians).

473. *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

474. 458 U.S. 718 (1982).

475. 518 U.S. 515 (1996) (*VMI*); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (holding that the use of peremptory challenges to excuse women because of their gender from serving on juries violated the Equal Protection Clause).

admissions policy did not further any legitimate state purpose and succeeded only in continuing to propagate female stereotypes that limited women's opportunities to occupations such as nursing.⁴⁷⁶ Justice O'Connor asserted that a gender classification case "must carry the burden of showing an 'exceedingly persuasive justification'"⁴⁷⁷ that the classification serves "important governmental objectives."⁴⁷⁸ When lawmakers enact statutes that classify according to gender, the State must demonstrate a "direct, substantial relationship between objective and means."⁴⁷⁹ *Hogan* concluded that no "reasoned analysis"⁴⁸⁰ could justify MUW's women-only admissions classification.

Justice O'Connor's opinion spells out how stereotypes can harm women. She rejected as unsupported the state's amorphous reference to remedying past discrimination⁴⁸¹ and emphasized that any legislation that classifies according to gender, even legislation that claims to be benign, must be enacted "free of fixed notions concerning the roles and abilities of males and females"⁴⁸² and "archaic and overbroad generalizations" about women's abilities.⁴⁸³ Justice O'Connor found that MUW's women-only admissions policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."⁴⁸⁴ She concluded that legislative decision making based on stereotypes cannot be permitted under the Equal Protection Clause, even if its effect arguably benefits women.⁴⁸⁵

The social context that supports this argument is found primarily in the footnotes. Justice O'Connor opened the opinion by noting that MUW is one of the nation's oldest female-only colleges. In the footnote to this statement, Justice O'Connor quoted the charter of MUW, "basically unchanged since its founding,"⁴⁸⁶ which places as its central purpose "the moral and intellectual advancement of the girls of the state."⁴⁸⁷ The school's mission was to provide training in what sociologists now call women's work: "school methods and kindergarten, for their instruction in bookkeeping, photography, stenography,

476. *Hogan*, 458 U.S. at 729-30.

477. *Id.* at 724 (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

478. *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

479. *Id.* at 725.

480. *Id.* at 726.

481. *Id.* at 727.

482. *Id.* at 724-25.

483. *Id.* at 730 n.16.

484. *Id.* at 729 & n.14 (citing statistics that, as of 1980, women earned 94% of all nursing degrees nationwide).

485. *Id.* at 728, 731, 733.

486. *Id.* at 720 n.1.

487. *Id.*

telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and . . . needlework."⁴⁸⁸ These are gender-segregated occupations typically remunerated at markedly low rates.⁴⁸⁹ In another footnote, Justice O'Connor noted that not until the 1920s did White women in the State of Mississippi gain wide access to public colleges, while White men had enjoyed that privilege since the 1800s.⁴⁹⁰ MUW, like other women's colleges established around the same time, remained the primary means for women in Mississippi to gain a higher education until the 1950s.⁴⁹¹

Justice O'Connor then criticized rational basis deference to gender classification schemes. Citing *Bradwell v. Illinois*,⁴⁹² a case that for her is emblematic of legislative infringement of women's equal protection rights,⁴⁹³ she explained that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislatures believed women were less able than men to perform a particular function."⁴⁹⁴ Notions of women's "nature, reason, and experience"⁴⁹⁵ ultimately "preclude women."⁴⁹⁶

From a relational framework standpoint, *Hogan* succeeds in setting forth the relevant social context, even if the bulk of it has to be uncovered from the footnotes. The origin of social identity stereotypes is historical. Women's colleges, which may appear to the dissent to provide "diversity" in the choice of educational environments,⁴⁹⁷

488. *Id.*

489. Alice Kessler-Harris presented a feminist perspective of the social and economic dynamics of "women's work":

[N]otions of propriety and role served as organizational principles for women's work force participation. They created a reciprocally confirming system in which successful job experiences for women were defined in terms of values appropriate to future home life: gentility, neatness, morality, cleanliness. . . . Although women typically chose jobs that reflected home-based values, these choices, regulated as they were by social and cultural norms, could hardly be said to be free.

ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 128 (1982).

490. *Hogan*, 458 U.S. at 727 n.13.

491. *Id.*

492. See 83 U.S. (16 Wall.) 130, 139 (1873) (refusing to invalidate under the Federal Constitution Illinois's exclusion of women from the state bar).

493. See O'Connor, *supra* note 183, at 1550 (citing *Bradwell*, and stating that after the enactment of the Fourteenth Amendment and for the first half of the twentieth century, "the Court continued to defer to legislative judgments regarding the differences between the sexes").

494. *Hogan*, 458 U.S. at 725 n.10 (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873)).

495. *Id.* (quoting *Bradwell*, 83 U.S. (16 Wall.) at 142 (Bradley, J., concurring)).

496. *Id.* (citing *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948)).

497. *Id.* at 735, 743-45 (Powell, J., dissenting).

appear to Justice O'Connor to represent part of a historical pattern that reinforces sex segregation and "archaic and stereotypic notions"⁴⁹⁸ that the law should not endorse because they can impede women's opportunities to advance.⁴⁹⁹

In *VMI*, decided fifteen years later, the Court determined the constitutionality of the men-only admission policy of Virginia Military Institute (VMI), a prestigious, state-supported, 100-year plus military institution.⁵⁰⁰ The State defended its men-only admission policy because it promoted educational diversity.⁵⁰¹ This policy was said to be necessary because admitting women to VMI would destroy its unique "adversative method,"⁵⁰² because women's cultural and physical differences made them unable to endure the rigors of this method,⁵⁰³ and because the alternative women-only academy, instituted at the prompting of litigation, provided "substantive comparability"⁵⁰⁴ to VMI.⁵⁰⁵ *VMI* applied *Hogan's* intermediate review standard and placed on the State the burden of providing an "exceedingly persuasive justification" that the gender classification at issue served a legitimate state purpose.⁵⁰⁶

As in *Hogan*, the Court's review of the State's purpose was rigorous and framed by an understanding of the interaction between traditional notions of women's capability and how this "common sense" can restrict women's opportunity. The Court began by rejecting the State's generalized claim of benign purpose, that VMI promoted educational diversity. Taking an approach similar to Justice O'Connor's in *Hogan*, Justice Ginsburg reviewed the Commonwealth of Virginia's history of providing college education to women. She asserted that the "'struggle for the admission of women to a state university'" was nowhere as contested and "drawn out . . . than that at the University of Virginia."⁵⁰⁷ She explained that not until the 1970s did the University

498. *Hogan*, 458 U.S. at 725.

499. See *id.* at 729 & n.15 (referring to the American Nurses Association's suggestion that "excluding men from the field has depressed nurses' wages" and stating that not admitting males "perpetuate[s] the stereotyped view of nursing as an exclusively woman's job").

500. *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*).

501. *Id.* at 535-36.

502. *Id.* at 540.

503. *Id.* at 535, 540-46.

504. See *U.S. v. Virginia*, 44 F.3d 1229, 1237, 1239 (4th Cir. 1995) (devising the "substantive comparability" test), *rev'd*, 518 U.S. 515 (1996).

505. *VMI*, 518 U.S. at 551.

506. *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

507. *Id.* at 537 (quoting 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 254 (1929)).

of Virginia, the most prestigious school in the State, open its doors to women.⁵⁰⁸ Following this litigation, Virginia's other fifteen public institutions of higher learning adopted coeducation admissions policies, except VMI, which remained "unique[ly]"⁵⁰⁹ the only single-sex institution.⁵¹⁰ In contrast to these nationally prestigious institutions that facilitated men's higher education, women's higher education from the 1830s to the mid-1900s was primarily limited to single-sex colleges with markedly inferior opportunities.⁵¹¹ For example, Farmville Female Seminary provided instruction in "'English, Latin, Greek, French and piano' in a 'home atmosphere.'" ⁵¹² The Court concluded that this history demonstrated that VMI was not established with the purpose of providing educational diversity; instead, VMI's policy was part of a pattern of discrimination in which the more prestigious and better opportunities for higher education were reserved for boys and men.⁵¹³

With respect to the claims that women would disrupt the adversative educational method, the Court was confronted with expert testimony that asserted that VMI's method was not appropriate for women.⁵¹⁴ Justice Ginsburg rejected this claim as a "judgment hardly proved" and a "prediction hardly different from other 'self-fulfilling prophec[ies]' once routinely used to deny rights or opportunities" to

508. *Id.* at 538 (citing *Kirstein v. Rector & Visitors of Univ. of Va.*, 309 F. Supp. 184, 186 (E.D. Va. 1970), the litigation that prompted the University of Virginia to admit women).

509. *See id.* at 534 n.7 (noting that the Court did not believe itself to be addressing the general proposition of the validity of single-sex education, but rather the fact that a unique opportunity—Virginia's premier military institution—remained available only to men).

510. *Id.* at 521 n.2.

511. *Id.* at 536-38.

512. *Id.* at 521 n.2 (citing R. SPRAGUE, *LONGWOOD COLLEGE: A HISTORY* 7-8, 15 (1989)).

513. *Id.* at 539-40 ("A purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan—a plan to 'affor[d] a unique educational benefit only to males.' However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters." (citation omitted) (alteration in original)).

514. *Id.* at 542-43. For Professor Gilligan's response to the psychologists' opinions submitted by the State, see Brief Amici Curiae of Professor Carol Gilligan and the Program on Gender, Science, and Law, *United States v. Virginia*, 96 F.3d 114 (4th Cir. 1996) (Nos. 94-1667 & 94-1717), reprinted in *Opposing All-Male Admission Policy at Virginia Military Institute: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science, and Law*, 16 WOMEN'S RTS. L. RPTR. 1, 10 (1994) (disputing the belief of VMI and some of its witnesses that "a generalization about women is not a 'stereotype' if it has some statistical validity"). Professor Gilligan argued that "[t]hese stereotypes reflect cultural values [H]igher values are assigned to the competency (male-associated) cluster than to the expressive (female-associated) cluster. This, of course, has serious consequences for the value placed on men's and women's activities." *Id.* at 10 (quoting CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 84 (1988) (second alteration in original)).

women.⁵¹⁵ As examples of these self-fulfilling prophecies, Justice Ginsburg cited the resistance to the entry of women in legal education and “fear” of admitting women to medical faculties.⁵¹⁶ Such “generalizations or ‘tendencies’”⁵¹⁷ reinforce “‘fixed notions concerning the roles and abilities of males and females,’” that close the “gates to opportunity” to women.⁵¹⁸ Further, although most women might well forego the opportunity to participate in adversative education,⁵¹⁹ their categorical exclusion bars those who might choose this method, thrive in such an environment, and benefit from this opportunity for a quality education.⁵²⁰

In unusually broad and unequivocal language, Justice Ginsburg provided both an antidiscrimination/citizenship and antisubordination theoretical anchor as to why the Equal Protection Clause proscribes such a continuation of stereotypes about women. From an equal opportunity perspective, “a law . . . [should not deny] . . . women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”⁵²¹ From an antisubordination perspective, “classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women,”⁵²² or to “‘preserv[e] tacit assumptions of male superiority—as assumptions for which women must eventually pay.’”⁵²³

2. *Negative Social Identity as a Harm.*—The intermediate review applied in *Hogan* and *VMI*, as noted by Justice Scalia in his *VMI* dissent,⁵²⁴ is in application deeply “skeptical” of the State’s proffered purposes.⁵²⁵ This heightened review is the doctrinal instrument that

515. *VMI*, 518 U.S. at 542-43 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (alteration in original)).

516. *Id.* at 543-44.

517. *Id.* at 541 (citation omitted).

518. *Id.* (quoting *Hogan*, 458 U.S. at 725).

519. *Id.* at 542 (adding that “it is also probable that ‘many men would not want to be educated in such an environment’” (quoting *U.S. v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (en banc) (mem.) (Motz, J., dissenting))).

520. *Id.* at 542, 545-46.

521. *Id.* at 532 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 462-63 (1981)).

522. *Id.* at 534 (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

523. *Id.* at 535 n.8 (quoting C. JENCKS & D. RIESMAN, *THE ACADEMIC REVOLUTION* 297-98 (1968)).

524. See *id.* at 570-76 (Scalia, J., dissenting) (arguing that the Court used intermediate scrutiny in *VMI* in a manner contrary to precedent).

525. See Bhagwat, *supra* note 441, at 344-45 (noting that the Court views gender classifications with suspicion in its purpose review); Fallon, *supra* note 386, at 70 & n.80 (citing *VMI* as an example of the type of judicial scrutiny that focuses on “the deliberative process

enables the Court to ensure that a state does not legitimize through its educational practices a negative social identity of women that harms them by limiting their opportunities.⁵²⁶ In both cases, the Justices' understanding of the State's construction of women's social identity, and how this construction affects women's opportunities, drives the decisions. This is an important accomplishment from a relational framework perspective, because the Court is educating the polity as to the nature of the gender role "disagreement" and explaining the social dynamics of stereotyping. Stereotypes limit both individual men and women; however, they have greater impact on women, as individuals and as a minority group.

What are the stated harms? In *VMI*'s case, the State estimated that ten percent female enrollment would be necessary to attract and retain women.⁵²⁷ In *Hogan*, no women were shown to be harmed. The plaintiff was a man who wished, for the sake of convenience, to enroll in nearby MUW.⁵²⁸ Both *VMI* and *Hogan*, however, clearly articulate that the constitutional harm lies principally in the State making decisions on the basis of gender stereotypes.

In *VMI*, the State concluded that VMI's educational environment was inappropriate for women based on a generalization that women lacked the physical and psychological rigor to withstand VMI's unique teaching method, and that instead, women were better off in an environment that emphasized cooperation rather than competition.⁵²⁹ With respect to men, the State generalized that they would not be able to maintain the benefits of VMI's adversative method in a coeducational environment.⁵³⁰ The State proffered expert psychological testimony to support these judgments.⁵³¹ Justice Ginsburg challenged the State's reasoning and the State's psychologists, applying a more sophisticated understanding of how socially enforced gender roles limit women's "choices." State practices that reinforce ideological structures of what is "natural" to men and women ultimately limit women's opportunities, even if these are a handful, as they were in Myra

from which a challenged statute or policy resulted"); Sunstein, *supra* note 441, at 76-79 (arguing that the Court's three-tiered review is blending into a continuum).

526. See Rosenfeld, *supra* note 42, at 1741 (arguing that constitutional equality should not be limited to preserving the integrity of the political process, but should extend to issues of substantive equality such as disparities in education); Tribe, *supra* note 259, at 1067-72 (arguing that process theory requires substantive judgments).

527. *VMI*, 518 U.S. at 523.

528. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982).

529. See *VMI*, 518 U.S. at 540-41.

530. *Id.* at 540.

531. See *id.* at 541 (stating that VMI's experts opined that men tend to need "an atmosphere of adversativeness" and women need a "cooperative atmosphere").

Bradwell's day. Also, men are limited by the coordinate stereotypic notions of their potentiality.

In *Hogan*, Justice O'Connor pointed out that there is an existing structure, supporting a constructed identity for women, that limits their opportunities: segregated education (MUW), which leads to a female segregated occupation (nursing), which limits women's economic opportunities (low pay relative to the male-dominated equivalent, physicians).⁵³² Justice O'Connor used her understanding of social dynamics to require State actors to reexamine those practices and policies based on "archaic" stereotypes, and to ensure that the State was not apportioning benefits based on them.⁵³³

In both these cases, the Justices did a fine job of explicating the links between history, ideology concerning what is "natural" for women, and reduced opportunities. It is likely no accident that both Justices O'Connor and Ginsburg have had first-hand knowledge of how the social construction of gender can harm women.⁵³⁴ This supports the view that, if our goal is to promote better understanding between majorities and minorities, appointments to the bench should reflect a wide variety of experiences and perspectives.

3. *Narrow and Proportional Remedies.*—Both *Hogan* and *VMI* offered the Court the opportunity to make either broad or narrow statements on a highly contested issue: the appropriate treatment of gender. For example, *Hogan* could be broadly interpreted as holding

532. *Hogan*, 458 U.S. at 729-30.

533. *Id.* at 725.

534. See O'Connor, *supra* note 183, at 1548-49 (stating that she has observed "the revolution in the legal profession that has resulted in women representing nearly thirty percent of attorneys" and that she was unable, "after graduating near the top of [her] class at Stanford Law School, . . . to obtain a position at any national law firm, except as a legal secretary"). Justice Ginsburg headed the Women's Project in New York, where she played the role of advocate in key gender discrimination cases, including: *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality opinion); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion); *Reed v. Reed*, 404 U.S. 71 (1971). See Maureen B. Cavanaugh, *Towards A New Equal Protection: Two Kinds Of Equality*, 12 LAW & INEQUALITY 381, 387 n.27 (1994) (noting that "[t]he pivotal role of then advocate Ginsburg in arguing the cases which resulted in gender being recognized as 'quasi-suspect' should not be underestimated"). See generally Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 267-68 (1997) (relating her role in key gender equality litigation of *Reed*, *Frontiero*, and *Weinberger* and explaining the role of these cases in combating limited opportunities for women based on gender stereotypes); Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 17 (1997) (relating experiences on the bench, in academia, and as a law graduate in which she experienced discrimination and conduct that devalued her individual worth based on stereotypes).

that current practices that affirm past class-on-class discrimination, and which reaffirm current stereotypical notions, cannot pass constitutional muster, even when no individual women are cognizant that they are being harmed. This interpretation would be far-reaching because a multitude of social and economic practices “box” women into roles that limit their economic and occupational opportunities. Alternatively, both cases could be read narrowly. Both Justices noted that the issues involved were unique.⁵³⁵ One can infer that the Court did not intend to make generalized findings about the broad significance of stereotypes and state practices, but instead that it sought to require what the relational framework advocates. State decision makers must endeavor to provide adequate public justification for any decision that could be influenced by “archaic” gender stereotypes. This ensures they provide justifications that women, as a minority, “might reasonably accept,” and that decision makers have thought through the impact of their actions on women.

4. *Leaving Room for Reasonable Disagreement.*—*Hogan* and *VMI* present a strong and clear interpretation of the significance of women’s present social identity. The Court needed to articulate the minority perspective in this manner in order to counter the majority perspective, which can easily trivialize the limitations that gender stereotypes place on women. The relational framework advocates this sort of approach, so as to establish a context for reasonable disagreement outside of constitutional discourse.

At the same time, the relational framework favors a narrow interpretation of both these cases. The Court should not truncate democratic disagreement; therefore, these holdings must leave room for the opposing perspective, expressed in the dissents, that cultural values are preserved when men and women follow their traditional social roles.⁵³⁶ This counterbelief merits as much respect as the view that socially constructed women’s differences limit their opportunities. Under the relational framework, the Court should not mandate or legitimize one perspective over another. The dialogue and the tension between these two perspectives will be ongoing and will predictably spill over into other political spheres. The Court’s role, successfully followed in these cases, is to ensure greater understanding between opposing points of view. Because it would be improper for the Court to influence future disputes, these holdings should be con-

535. See *VMI*, 518 U.S. at 534 n.7; *Hogan*, 458 U.S. at 720 n.1.

536. See *VMI*, 518 U.S. at 601-03 (Scalia, J., dissenting) (praising *VMI*’s attachment to “such old-fashioned concepts as manly ‘honor’” and its gentleman’s code).

strued as being limited to VMI's and MUW's admissions policies in order to permit room for the polity to continue to work out its difference in ongoing debates.

C. *City of Richmond v. J.A. Croson Co. and Adarand Constructors, Inc. v. Peña: The Judiciary and Divisive Political Issues*

From the standpoint of the relational theory of public reason proposed in this Article, the Court's decisions in *City of Richmond v. J.A. Croson Co.*⁵³⁷ and *Adarand Constructors, Inc. v. Peña*⁵³⁸ are mixed and complex. In both of these decisions, although the Court did address majority concerns and narrowly tailor its decisions to the facts, it also failed to address minority views on discrimination and to refrain from truncating debate on racial issues in the public realm. The following discussion applies the relational framework to sort out the positive and negative aspects of these decisions and to explain why they are still having ripple effects on the polity's racial discourse.

Adarand and *Croson* mark a significant change in the Court's affirmative action jurisprudence. In both cases the Court adopted a more skeptical stance toward affirmative action programs, shifting to a strict scrutiny review.⁵³⁹ The test requires programs that use racial classification to be scrutinized to determine whether the state purpose is "compelling," whether the program is "narrowly tailored," and whether less restrictive alternatives are available to attain such ends.⁵⁴⁰

In *Croson*, the Court held unconstitutional a Richmond ordinance that required construction contractors to pledge to subcontract at least thirty percent of the awarded contract amount with "minority" owned businesses.⁵⁴¹ Richmond's program had attempted to increase minority representation in an industry in which racial minority representation was negligible.⁵⁴² Richmond had modeled its program on a similar federal program that the Supreme Court had ruled permissible in *Fullilove v. Klutznick*⁵⁴³ under the intermediate review standard.⁵⁴⁴ However, in *Croson* the Court found such a scheme to be

537. 488 U.S. 469 (1989).

538. 515 U.S. 200 (1995).

539. See *Adarand*, 515 U.S. at 221-31; *Croson*, 488 U.S. at 493-94 (plurality opinion); *id.* at 520 (Scalia, J., concurring).

540. See *Adarand*, 515 U.S. at 235; *Croson*, 488 U.S. at 493-94 (plurality opinion).

541. *Croson*, 488 U.S. at 477, 505-06.

542. *Id.* at 479-80.

543. 448 U.S. 448 (1980) (plurality opinion), *overruled by Adarand*, 515 U.S. at 235.

544. See *Croson*, 488 U.S. at 484.

"gross[ly] overinclusive[],"⁵⁴⁵ akin to a racial "quota system,"⁵⁴⁶ and not sufficiently grounded in legislative factual findings.⁵⁴⁷

Adarand extended to the federal level the Court's earlier decision in *Croson*, holding that affirmative action programs mandated by Congress are subject to strict scrutiny review.⁵⁴⁸ Specifically, Justice O'Connor remanded for further review a program under which the Department of Transportation allocated monetary compensation for federal contractors who subcontracted ten percent of the contract amount to "minority" qualified contractors as defined by the Small Business Administration regulations.⁵⁴⁹

1. Adarand and Croson Are Partially Consistent with the Relational Concept of Public Reason.—

a. Adarand and Croson Require Governmental Units to Narrowly Tailor Their Race-Based Decisions.—As has been discussed, the relational framework encourages courts and other decision makers to issue narrow decisions with respect to hotly contested issues in order to facilitate the accommodation of multiple views.⁵⁵⁰ *Adarand* and *Croson* are consistent with this approach in so far as they also call for moderation, narrowness, and proportionality. Following these decisions, governmental agencies cannot justify affirmative action programs merely by referring to a generalized assumption that racial classification serves some type of state interest. In *Adarand*, the Court rejected the position that race alone can stand as a proxy for socioeconomic disadvantage in a minority set-aside government contract program.⁵⁵¹ Similarly, in *Croson*, the Court found that Richmond's minority contract set-aside program was a "rigid racial quota" unsupported by any findings of fact.⁵⁵² Both of these cases require a "strong basis in evidence"⁵⁵³ upon which to design affirmative action pro-

545. *Id.* at 506.

546. *Id.* at 508.

547. *Id.* at 510-11.

548. *Adarand*, 515 U.S. at 227. In so holding, the *Adarand* Court overturned *Metro Broadcasting v. FCC*, 497 U.S. 547, 566 (1990), which held that the FCC's programs designed to increase minority ownership of broadcast licenses were constitutional under intermediate scrutiny.

549. *Adarand*, 515 U.S. at 237-39.

550. *See supra* Part IV.B.2.d

551. *Adarand*, 515 U.S. at 205, 238 (discussing the presumption of federal law that "disadvantaged individuals" include minorities and remanding the case to determine whether this can survive strict scrutiny).

552. *Croson*, 488 U.S. at 499.

553. *See Adarand*, 515 U.S. at 222 (citing *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1985) (plurality opinion))).

grams. For example: a marked disparity in the representation of minorities involved in the construction industry is not sufficient evidence of "the precise scope of the injury [the legislature] seeks to remedy";⁵⁵⁴ findings of discrimination on a national basis cannot justify local remedial programs;⁵⁵⁵ and a showing that general structural conditions limit access to an important business institutional network fails to provide a sufficient link to discrimination to support a local affirmative action program.⁵⁵⁶

Moreover, even after discrimination has been established, an affirmative action program must be narrowly tailored to remedy the identified injury.⁵⁵⁷ In *Croson*, for example, the thirty percent minority set-aside was found so overbroad in scope that, to Justice O'Connor, it seemed to rest on an unsupported assumption that White contractors simply would not hire minority firms.⁵⁵⁸ The credibility of Richmond's set-aside program was also undermined by the inclusion of Eskimos, Aleuts, Native Americans, and Southeast Indians, a "gross overinclus[ion]" in light of the program's remedial purpose.⁵⁵⁹ In *Adarand*, the Court cast doubt upon the federal government's assumption that *any* individual who belonged to a minority group was "socially disadvantaged."⁵⁶⁰ The Court's "narrowly tailored" requirement can be viewed as a requirement that satisfies the relational framework's emphasis on issuing limited decisions on highly contested moral or epistemological issues. If minorities are to benefit from these divisive programs, the benefits cannot be overly inclusive or disproportionate.

b. Adarand and Croson Require Governmental Units to Provide Better Justifications to Whites for Affirmative Action Programs.—The relational framework conceptualizes public reason as requiring justification to be offered to those most impacted by state action with which they disagree. *Adarand's* version of "strict scrutiny" could be interpreted as ensuring that the state will provide reasonably acceptable justifications to those most likely to be harmed by affirmative action

554. *Croson*, 488 U.S. at 498.

555. *Id.* at 504.

556. *Id.* at 499 (describing such structural conditions as a "sorry history of . . . discrimination . . . [that] standing alone, cannot justify a rigid racial quota").

557. See *Adarand*, 515 U.S. at 235-37; *Croson*, 488 U.S. at 506-08.

558. *Croson*, 488 U.S. at 502.

559. *Id.* at 506.

560. See *Adarand*, 515 U.S. at 237-38 (remanding for review under strict scrutiny the issue of the government's presumption that race is a proxy for social and economic disadvantage).

(Whites) and those who will disagree philosophically and morally with it. The justification, "it's your race —," is no longer sufficient.⁵⁶¹ Race as a proxy for an identified state need⁵⁶² is not a method of decision making that those who disagree can reasonably accept. Thus, the *Adarand* Court found that all race-based affirmative action programs require "strict scrutiny review," because the Fourteenth Amendment protects Whites' individual rights that could be harmed as a result of affirmative action programs, just as it protects racial minorities from the majorities' stigmatizing actions.⁵⁶³ As the next Part will discuss, the troubling question left by *Adarand* and *Croson* is what would be necessary for a program to pass "strict scrutiny." Much of Justice O'Connor's *Adarand* opinion is devoted to assuring the dissenters that "strict scrutiny is [not] 'strict in theory, but fatal in fact,'"⁵⁶⁴ but instead requires only careful judicial examination to "'smoke out'" illegitimate state purposes.⁵⁶⁵

2. *Adarand and Croson Are Largely Inconsistent with the Relational Concept of Public Reason.*—The *Adarand* and *Croson* decisions are largely inconsistent with the relational model of public reason because they privilege majority epistemology and fail to engage an alternative minority view of racial discrimination. These decisions do so by employing a very cramped vision of what can constitute evidence of discrimination, thereby severely limiting the discretion of governmental actors to address racial problems; by interpreting equal protection as an individual right within a classless, raceless, legal, and social context, without discussing an alternative minority view of the nature of discrimination and affirmative action; and by truncating discussions that need to take place in the public sphere.

561. It is this feature of *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. dismissed, 118 S. Ct. 595 (1997), that in my opinion makes this a rightly decided case. The only reason given to Taxman for her layoff in favor of an African American teacher was that the Board of Education had adopted a policy of "diversity." *Id.* at 1552. Public reason requires a more rigorous public justification to take a color-conscious action.

562. See *Croson*, 488 U.S. at 500-01 ("A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists.").

563. See *Adarand*, 515 U.S. at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *Croson*, 488 U.S. at 493 ("[T]he 'rights created by the . . . Fourteenth Amendment . . . are personal rights.'" (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

564. *Adarand*, 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (plurality opinion) (Marshall, J., concurring), overruled by *Adarand*, 515 U.S. at 235).

565. *Id.* at 226 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).

a. *Evidence of Discrimination Is Narrowly Construed.*—In order to determine in *Croson* whether the State demonstrated a “compelling state purpose” that would justify affirmative action, Justice O’Connor assessed whether the State presented sufficient evidence of discrimination.⁵⁶⁶ Here, Justice O’Connor’s understanding of race relations informed her determination of which evidence “counts.” *Croson* excludes consideration of evidence of historical patterns of racial preferences that influence individuals’ current conduct and evidence of structural economic disadvantage, even though these are precisely the kinds of discrimination that are most meaningful from a racial minority perspective.

First, Justice O’Connor rejected as insignificant statistical proof showing that African Americans represented only .67% of the city’s contracts awards, while the population of Richmond was almost half African American.⁵⁶⁷ Justice O’Connor countered that the relevant number for comparison is the number of minority businesses currently *eligible* for contract awards, not the *total population* of Richmond.⁵⁶⁸ She found that it is “sheer speculation”⁵⁶⁹ to account for discriminatory impact by focusing on how many minority construction firms could have been engaged in Richmond, absent the City’s history of Jim Crow. Constitutionally cognizable discriminatory effect must focus only on presently qualified minority contractors.⁵⁷⁰

As Justice Marshall’s dissent notes, this approach renders irrelevant historical discrimination that has present day impact.⁵⁷¹ For Justice Marshall, Richmond’s program was connected to past Jim Crow practices that had perpetuated structural racial inequality in the construction industry.⁵⁷² To focus on minority contractors who are presently qualified, instead of those potentially qualified, ignores the

566. *Croson*, 488 U.S. at 498-506.

567. *Id.* at 499-500.

568. *Id.* at 501-02 (noting that “where special qualifications are necessary, the relevant statistical pool . . . must be the number of minorities qualified to undertake the particular task”).

569. *Id.* at 499.

570. *Id.* at 501-02.

571. *Id.* at 555-60 (Marshall, J., dissenting).

572. *See id.* at 544-46 (chiding the Court for ignoring Richmond’s “multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents’ voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination”). One cannot help but feel Justice Marshall’s anguish, as a civil rights warrior nearing the end of his career, when the majority placed no weight on this “sorry” local history.

minority view of how these historical patterns of institutional discrimination affect the present.⁵⁷³

Second, Justice O'Connor criticized Richmond for incorporating the *Fullilove* program's Congressional statistical finding that minority firms were disadvantaged due to past and present nationwide discrimination in the construction industry.⁵⁷⁴ For example, Congressional findings had traced credit institutions' practices of restricting African Americans' credit to how this affected the formation of African American new business.⁵⁷⁵ Justice O'Connor, however, found data of national and industry-wide practices that disadvantaged African Americans to be too "generalized,"⁵⁷⁶ and required localities to "identify that discrimination . . . with some specificity."⁵⁷⁷

Third, Justice O'Connor dismissed the City's proffered evidence of continuing exclusionary practices in the construction industry, such as affidavits by individuals testifying to continuing discrimination.⁵⁷⁸ Cronyism, a time honored tradition of favoring those already established, also was found to be irrelevant.⁵⁷⁹ Neither did Justice O'Connor acknowledge the racial urban and business segregation existing in Richmond, which continued to affect social and business practices even after the city had officially ended segregation.⁵⁸⁰

Justice O'Connor's approach to race discrimination in *Croson* contrasts sharply to her approach to gender discrimination in *Hogan*, in which she informed her analysis of present state practices by recognizing past practices in which majorities' "common sense" ideology disadvantaged women.⁵⁸¹ Justice O'Connor placed no weight on such dynamics in the context of race. Instead she called this "sorry history" too "amorphous"⁵⁸² to support the City's efforts to remedy what it

573. *Id.* at 542 (arguing that the issue is "whether *past* discrimination has resulted in the *continuing exclusion* of minorities").

574. *Croson*, 488 U.S. at 504-05.

575. *See Fullilove v. Klutznick*, 448 U.S. 448, 511 n.11 (1980) (Powell, J., concurring), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

576. *Croson*, 448 U.S. at 498.

577. *Id.* at 504.

578. *See id.* at 500 (stating that "[t]hese statements are of little probative value").

579. *See id.* at 542 (Marshall, J., dissenting) (criticizing the majority for not considering whether past discrimination has resulted in the "*continuing exclusion* of minorities from a historically tight-knit industry"); *see generally* McGinley, *supra* note 101, at 1053-56 (arguing that affirmative action programs are needed to counter the effects of cronyism).

580. *See Croson*, 488 U.S. at 540-46 (Marshall, J., dissenting).

581. *See supra* Part V.B.1.

582. *Croson*, 488 U.S. at 499.

found to be widespread and historically based discriminatory practices.⁵⁸³

Justice O'Connor also failed to explain adequately why she abandoned her normally deferential approach toward regulation of state and local government decisions.⁵⁸⁴ After *Adarand* and *Croson*, local governments face a higher evidentiary burden, and therefore a higher transaction cost, if they seek to implement an affirmative action program.⁵⁸⁵ Moreover, there is great legal uncertainty (and therefore greater litigation risk exposure) as to what kind of local set-aside program can meet *Adarand's* and *Croson's* "strict scrutiny."⁵⁸⁶ Yet, Justice O'Connor failed to explain why dealing with racial discrimination is any more amorphous than other complex urban problems that local governments must address, such as taxation, crime, economic development, and regulation. In these areas, the Court applies deferential judicial review.⁵⁸⁷

Justice O'Connor's implicit understanding of racial dynamics drives this analysis. To identify race as too removed from the present harms that the government's affirmative action programs seek to remedy is initially a descriptive judgment, but in *Adarand* and *Croson*, this identification becomes substantive because it reshapes legally cognizable discrimination. Racially discriminatory history is simply "sorry," and potentially burdens the "dream of a Nation" in which "race is irrelevant to personal opportunity."⁵⁸⁸ For the Court to make "preferences based on inherently unmeasurable claims of past wrongs" and "consequent harm suffered" would be contrary to "the central com-

583. *Id.* at 476-80.

584. *See, e.g.,* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) (stating that "the autonomy of a State is an essential component of federalism").

585. *Croson*, 488 U.S. at 548 (Marshall, J., dissenting) (noting the "onerous documentary obligations" imposed by the majority's opinion).

586. *Compare* *Engineering Contractors Assoc. of So. Fla., Inc. v. Metropolitan Dade County*, 122 F.3d 895, 929 (11th Cir. 1997) (striking down an affirmative action procurement program for underrepresented Hispanics and African Americans in Dade County on the ground that it did not have a proper evidentiary basis and was not sufficiently tailored), *cert. denied*, 118 S. Ct. 1186 (1998) with *University & Community College Sys. v. Farmer*, 930 P.2d 730, 735 (Nev. 1997) (upholding an affirmative action program designed to provide additional positions and supplementary pay for African American university faculty which, after three years, resulted in over \$10,000 per annum salary difference with a White faculty member hired the same year with roughly the same qualifications), *cert. denied*, 118 S. Ct. 1186 (1998).

587. *See, e.g.,* *FCC v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any . . . rational basis for the classification.").

588. *Croson*, 488 U.S. at 505.

mand [of] equality."⁵⁸⁹ Moreover, generalized assertions of past discrimination have "no logical stopping point."⁵⁹⁰

This substantive understanding of racial dynamics is based on a majority epistemology. Justice O'Connor recognizes only the kind of discrimination that permits Whites to take comfort that racism is removed from them; has a discernible stopping point; and possesses a contour that permits Whites to escape racial guilt, anxiety, and responsibility from the view that Whites participate, unconsciously and through privilege, in systemic societal racism.⁵⁹¹ By contrast racial minorities describe racism as continuous, systemic, widespread, and negligent.⁵⁹² Racial minorities' concern is to overcome a past class-on-class discriminatory history in order to gain a foothold on the ladder of economic and social advancement. Thus Justice O'Connor chose a majority perspective when she found, as a matter of constitutional law, that discrimination must be as narrowly circumscribed and proven as described in *Croson* to justify a locality's affirmative action programs.

b. *The Nature of Discrimination Is Individually Based.*—*Adarand* and *Croson* also adopt, without discussion or justification, majority views of the nature of discrimination. Specifically, the decisions are founded on the premises that discrimination is individual rather than class-based,⁵⁹³ and that discrimination against Whites is no different than discrimination against racial minorities.⁵⁹⁴ Both views are highly controversial and the Court's opinion should have engaged the opposing perspective.

In repeatedly stating that antidiscrimination is an individual right, the *Adarand* and *Croson* decisions rejected without discussion a meaningful and rich history of the enactment of the Thirteenth and Fourteenth Amendments. While scholarly analysis of the history of

589. *Id.* at 506 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 296-97 (plurality opinion)).

590. *Id.* at 498 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1985) (plurality opinion)); see *id.* at 496-97 ("[T]he remedying of the effects of 'societal discrimination' . . . may be ageless in its reach into the past." (quoting *Bakke*, 438 U.S. at 307)).

591. See *supra* notes 101-130 and accompanying text.

592. See *supra* notes 131-137 and accompanying text.

593. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments . . . protect *persons*, not *groups*."); *Croson*, 488 U.S. at 508 (establishing that remedial relief must be tailored to those individuals "who truly have suffered the effects of prior discrimination").

594. See *supra* Parts I.A.1-4 (discussing race-based discrimination); cf. *Adarand*, 515 U.S. at 224 (asserting the principal of consistency according to which the strict scrutiny standard of review does not depend on the race of those burdened or benefitted by the particular classification).

these clauses is far from uniform,⁵⁹⁵ there is robust historical evidence that when Congress enacted these Amendments, it intended to address hostile White on Black relations,⁵⁹⁶ and more generally class-on-

595. See, e.g., CHESTER JAMES ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* v (1981) (arguing that one should look to "the intent of those who ratified" the Amendment to find its true meaning); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 407-18 (1977) (questioning the Court's "authority to revise the Constitution" by extending the Amendment beyond its original limitation to carefully enumerated rights against state discrimination); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 7-9 (1908) (providing a "historical judgment as to the purpose and object of the Amendment"); JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 302 (1984) (asserting that "no single objective animated those who proposed and ratified the Fourteenth Amendment"); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 274-75 (1977) (arguing that the roots of modern Fourteenth Amendment views originated in the antislavery movement); Bickel, *supra* note 267, at 29-65 (providing a detailed account of the role played by the Joint Committee on Reconstruction); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 WASH. U. L.Q. 421, 476-78 (arguing that the Equal Protection Clause must be interpreted in the context of the entire Reconstruction decade); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1086 (1956) (arguing that the meaning of the Fourteenth Amendment has its origins in radical pre-war anti-slavery theory, but ultimately "reflect[s] . . . the evolution of democratic aspiration, will and myth in the American social order on the question of race and caste"); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 540 (1985) (asserting that "[n]o theory of the intent of the drafters" can be consistent with all the historical evidence, because the evidence itself is inconsistent); Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 968-70 (1984) (arguing that the origin of section one of the Amendment in moderate republican politics suggests an intent to transfer some authority to the federal government without constitutionalizing general rights of fairness); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247 (1997) (arguing that the interpretation of the Equal Protection Clause endorsed "by the majority in the racial gerrymandering cases—though normally attractive, rhetorically powerful, and politically popular—is profoundly inconsistent with the original understanding of the Fourteenth Amendment"); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (arguing that the history of the Fourteenth Amendment indicates that it is not intended to prohibit affirmative action).

596. Professor Bickel observed that "[e]veryone's immediate preoccupation in the 39th Congress—insofar as it did not go to partisan questions—was, of course, with hardships being visited on the colored race." Bickel, *supra* note 267, at 60. Bickel concluded that the legislative history of the Fourteenth Amendment shows emphatically that the Black Codes were the evil that the Fourteenth Amendment and the Civil Rights Act were designed to correct. *Id.* at 11, 12, 17 & n.42; see also Dimond, *supra* note 41, at 477 (arguing that the Fourteenth Amendment sought to address not only the Black Codes, but also facially neutral laws used to oppress Blacks and the states' failure to protect against community bias and private intimidation); Karst, *supra* note 39, at 49-61 (concluding that in the debates, Black Codes were described as a means to impose indirectly a kind of servitude equivalent to slavery, which the war and the Constitution had made illegal); Saunders, *supra* note 595, at 268 (arguing that the drafters of the Fourteenth Amendment considered themselves to be "devising a plan for the reconstruction of the Union that would secure the principles for which the North had fought the Civil War").

class relations.⁵⁹⁷ Although Congress chose to address this concern by prohibiting interference with individual rights,⁵⁹⁸ it more broadly sought to accommodate the many competing societal interests that it had to consider in the enactment of the clause.⁵⁹⁹ Thus, the Court's narrow construction of the Equal Protection Clause⁶⁰⁰ in *Adarand* and

In the debate of the Civil Rights Act of 1866, Senator Trumbell (not a Radical) stated that, despite the abolition of the slave codes, the South now had Black Codes, which "still impose upon [the freedmen] the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). The 39th Congress understood that, after the war, Southern White society had attempted to reinstate antebellum society through laws and through state officials' non-enforcement of basic protections of the recently emancipated population. The Black Codes were repeatedly characterized as denying the freedmen the most basic of liberties that civilized men would ordinarily possess: the right to vote, the right to move freely, and the right to hold property. CONG. GLOBE, 39th Cong., 1st Sess. 3034-35 (1866) (statement of Sen. John B. Henderson). Senator Timothy O. Howe argued that the freedmen had been deprived of the most basic rights: "The right to hold land . . . the right to collect their wages by the processes of law . . . the right to appear in the courts as suitors . . . the right to give testimony . . ." CONG. GLOBE, 39th Cong., 1st Sess. App. 219 (quoted in Bickel, *supra* note 267, at 53).

597. See CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Thomas Eliot) (explaining that the Equal Protection Clause would "prohibit State legislation discrimination against classes of citizens"). A proposal designed to limit the reach of the Fourteenth Amendment's coverage to only the freedmen was rejected, in part because the 39th Congress was concerned with possible targeting of White Southerners who had been loyal to the North, once Reconstruction had ceded control of Southern legislatures to the former Rebel loyalists. See CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (reporting John Bingham's assertion that the Equal Protection Clause was aimed at protecting "loyal white citizens of the United States"); CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (arguing that the Amendment's purpose was to protect the "loyal white minority" and the "disenfranchised colored").

598. See *supra* note 3 (setting forth the text of the Fourteenth Amendment).

599. Accordingly, the Clause lends itself to competing reasonable interpretations. See *supra* note 595. Among the competing considerations were (1) President Johnson's hostility toward radical Republicans and his veto of the Civil Rights Act of 1866, which was subsequently passed over his veto; (2) the necessity of putting laws in place that would not be eroded once the former Southern secessionist states were readmitted into the Union, and specifically, Congress's concern that the Civil Rights Act protections should be a permanent guarantee; (3) avoiding a broad delegation of congressional power that might easily lead to unwanted intrusions into Northern states' understanding of states' sovereign power; and (4) Republicans' concerns that their legislative program would not unduly affect their reelection. See Bickel, *supra* note 267, at 7, 41-65. As M. Russel Thayer of Pennsylvania then put it, "As I understand it, it is but incorporating in the Constitution . . . the principle of the civil rights bill . . . [so that it] shall be forever incorporated." CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866).

600. There is scholarly debate on the "color-blind" interpretation of the Equal Protection Clause. See, e.g., JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION* 116 (1983) ("The debates . . . refute the contention that the goal was to eliminate all legislation based on race."); Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics*, 12 GA. ST. U. L. REV. 1129, 1148-50 (1996) (suggesting that the Framers did not intend the Fourteenth Amendment to force a general rule of color-blindness on the states); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (arguing that

Croson decontextualizes social dynamics and yet still permits the Court to use the powerful rhetoric of antidiscrimination doctrine,⁶⁰¹ individual dignity,⁶⁰² and the harm of stigma⁶⁰³ to justify strict scrutiny review of affirmative action programs.⁶⁰⁴

The Court in *Adarand* and *Croson* did not justify its assumption that harm to Whites under affirmative action programs is equivalent to the harms suffered by minorities under race conscious decision making. Rather, it simply concluded that in both cases the individual is subject to being judged on the basis of "‘his racial or ethnic background[,] . . . [which] impinge[s] upon personal rights.’"⁶⁰⁵ Therefore, any "race-based" public decision making is inherently suspect and can potentially harm individual dignity and respect.⁶⁰⁶ To support this proposition in *Adarand*, Justice O'Connor merely cited the principles of congruence and consistency.⁶⁰⁷ She asserted that whenever the government treats any person—hence even Whites not burdened by a history of discrimination—on the basis of race, then that

"the belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders"); Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1080 (1996) ("[T]he Framers of the Fourteenth Amendment did not understand the law they were enacting as turning the Constitution color-blind . . ."); Laurence H. Tribe, "In What Vision of the Constitution Must the Law Be Color-Blind?," 20 J. MARSHALL L. REV. 201, 204 (1986) ("[W]e know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think 'equal protection of the laws' made *all* racial distinctions in law unconstitutional.").

601. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (discussing the principle of "consistency" in the context of antidiscrimination law).

602. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (arguing that all citizens have "‘personal rights’ to be treated with equal dignity and respect").

603. See *Adarand*, 515 U.S. at 229 (asserting that the stigma which results from racial classification supports the requirement for strict scrutiny).

604. See generally T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1121-25 (1991) (arguing that race-conscious constitutional construction is necessary to ensure that aspirations of equal protection are met); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 47-52 (1991) (arguing that it is a misapprehension of the nature of race in America to treat it as a formal, rather than historical, category); Rosenfeld, *supra* note 42, at 1731-35 (arguing that the strict scrutiny test is inappropriate in cases like *Croson* because it functions "as an abstract, detached, and purely formal procedure rather than as a substantially fair and practically oriented means to resolve conflicting claims").

605. *Adarand*, 515 U.S. at 224 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (plurality opinion)).

606. See *Croson*, 488 U.S. at 493 (plurality opinion) ("To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.").

607. *Adarand*, 515 U.S. at 223-24, 229-30.

person suffers an injury,⁶⁰⁸ and that because affirmative action programs implicate fundamental individual rights, the Court should not defer to “‘rough compromise[s]’” of “‘the democratic process.’”⁶⁰⁹

At an abstract, decontextualized level, the argument that affirmative action derogates individual rights is appealing, but on closer analysis it lacks the substance the relational framework would require. Justice O'Connor rhetorically recalled Dworkinian hermeneutics by claiming that the principle of consistency, in the abstract, mandates her result.⁶¹⁰ Her arguments are primarily self-legitimizing. She made repeated generalized references to the idea that race conscious decision making is “contrary to . . . equality”⁶¹¹ and that race-consciousness per se undermines the “dream of a Nation of equal citizens.”⁶¹² She emphasized the importance of being judged as an individual and having “the opportunity to compete” without the outcome being determined “solely upon [one’s] race.”⁶¹³ Justice O'Connor asserted that the Constitution mandates that the Court apply skeptical review to any public decision making that requires judging individuals as part of a group.⁶¹⁴ Justice Scalia’s concurrence in *Adarand* made this assertion more generally and with more rhetorical force by stating at the conclusion to his concurrence: “In the eyes of government, we are just one race here. It is American.”⁶¹⁵ As precedent, Justice O'Connor cited principally her own decisions in *Croson* and *Wygant*, and Justice Powell’s *Bakke* plurality decision.⁶¹⁶ In short, these statements appear persuasive because they are anchored in a

608. *Id.* at 229-30.

609. *Id.* at 224 (quoting *Bakke*, 438 U.S. at 299).

610. Compare DWORKIN, *supra* note 279, at 86-87 (arguing that the doctrine of political responsibility requires that judges “can justify [their decisions] within a political theory that also justifies the other decisions they propose to make”) with *Adarand*, 515 U.S. at 229-30 (noting that the principle of consistency supports the law treating in the same manner color-conscious actions that impact on Whites and African Americans and then citing the majority opinion in *Croson* for support that the strict scrutiny applies). This decontextualized exercise mocks the principle of consistency by failing to engage the full complexity of the race relations problem presented by affirmative action, but also underscores what has been argued in Part III, *supra*, that in majority-minority conflict cases, social context, not abstract principles, are outcome-determinative.

611. *Croson*, 488 U.S. at 506.

612. *Id.* at 505.

613. *Id.* at 493 (plurality opinion).

614. See *Adarand*, 515 U.S. at 227 (describing race as a “group classification” subject to strict scrutiny to ensure the “personal right to equal protection”).

615. *Id.* at 239 (Scalia, J., concurring).

616. See *supra* notes 581-590, 601-614 and accompanying text (discussing Justice O'Connor’s reasoning process in *Adarand* and *Croson*).

majority perspective of equality, color-blindness, unity, merit, and competition.⁶¹⁷

Yet Justice O'Connor never addressed the most obvious "consistency" issue: whether the social and legal positions of Whites and racial minorities are sufficiently comparable that skeptical review is mandated by the Constitution in both cases. Thus she avoided discussing case law and historical precedent supporting the proposition that the Equal Protection Clause also emphasizes the caste/subordination aspect of race relations.⁶¹⁸ Even more significantly from the perspective of this Article, she also did not attempt to justify her decision to those who hold an alternative view of discrimination.

To substantiate her claim that governmental classification by race harms any person—hence Whites as much as racial minorities—Justice O'Connor offered the powerful rhetoric of stigma. She asserted that governmental remedial programs that lack adequate rationales "stigmatize" minority individuals because these programs "'inevitably [are] perceived . . . as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.'"⁶¹⁹ Thus she equated the negative assumptions that some Whites make when racial minorities benefit under affirmative action programs⁶²⁰ with the segregation stigma of *Brown* and the social identity restrictive "box" of Myra Bradwell.⁶²¹

617. See generally Lazos Vargas, *supra* note 33, at 1595 (explaining how equality, individuality, and merit are American cultural values and arguing that "[t]he myth of oneness and sameness is an ideological construction").

618. See *supra* note 600 (setting forth alternative scholarly interpretations to the Court's "color-blind" interpretation of the Equal Protection Clause).

619. *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Kultznick*, 448 U.S. 448, 545 (1980) (plurality opinion)); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (noting that "[c]lassifications based on race carry a danger of stigmatic harm" because "they may in fact promote notions of racial inferiority"); *Metro Broad. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (arguing that "policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens").

620. This Article does not mean to imply that all Whites oppose affirmative action or that all Whites would hold on to meritocratic and individualistic mythologies to deny the past and present suffering of racial minorities. What it means to convey is that White backlash against affirmative action is part of the psychology and mythology of White racial innocence. See John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 333-34 (1994) (arguing that White Americans' narrative of "neutral absolute standards" serves to distance them from advantages received); Ross, *supra* note 127, at 298-308 (explaining that affirmative action debate is framed in the rhetoric of "white innocence," and that this approach avoids dealing with problems of unconscious racism).

621. See *supra* notes 492-493 (noting *Bradwell* and its significance for Justice O'Connor).

However, once one provides the social context for Justice O'Connor's argument, it becomes less defensible. According to a minority view of discrimination, the harm of "benign" discrimination is not the equivalent of the caste discrimination that African Americans suffered under school desegregation in *Brown v. Board of Education*⁶²² or the Jim Crow legislation in *Strauder v. West Virginia*.⁶²³ That is, the loss of government procurement contracts suffered by White contractors in *Adarand* cannot be equated with the stigmatization inflicted on historically oppressed minorities.⁶²⁴ Yet instead of dealing with the complex question raised by distinguishing between harms caused by differing kinds of discrimination,⁶²⁵ Justice O'Connor summarily concluded in *Croson* that this would be a dubious judicial enterprise, "contrary to . . . [the] central command [of] equality."⁶²⁶

Additionally, the "stigma" rationale is not fully supported with evidence likely to garner minority support. While it is likely true, as Justice O'Connor suggests, that affirmative action programs can reaffirm some Whites' racialized assumptions about minorities and exacerbate racial prejudice, she cited no evidence that such White backlash is either widespread or uniform.⁶²⁷ Thus, Justice O'Connor's argument

622. 347 U.S. 483 (1954).

623. 100 U.S. 303 (1880), *overruled on other grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975).

624. See *supra* notes 189-194 and accompanying text (discussing differences in kinds of subordination). Judicial decisions originally used the term "stigma" in connection with the caste status of African Americans during the Jim Crow era. See *supra* notes 43-44 and accompanying text (explaining the use of the term in *Brown*). A White individual suffers a harm to her dignity when she loses a government procurement program or is laid off because of her race. This is an arbitrary harm, which is not equivalent to that which a stigmatized racial minority suffers. Stigma is continuous, part of a context of the continuing devaluing of her social identity and self-worth. This distinction between an arbitrary harm and a stigmatic harm is at the core of Paul Brest's antidiscrimination principle and Charles Lawrence's description of cultural context argument. See Brest, *supra* note 36, at 8-12 (describing the cumulative, debilitating harm caused by stigmatization); Lawrence, *supra* note 41, at 355-62 (proposing the "Cultural Meaning" test which "would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance").

625. See *supra* notes 157-158, 194 and accompanying text (discussing the different types of prejudice).

626. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (asserting that past harms are "inherently unmeasurable claims" and that courts should not be asked to "evaluate the extent of the prejudice and consequent harm suffered" because "such a result would be contrary to . . . equality" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 296-97 (1978) (plurality opinion))).

627. This Article does not accept the Court's assumption that White backlash against affirmative action is sufficiently widespread and vitriolic to rise to the level of a stigmatic action that merits constitutional solicitude.

relies on stereotypical "generalizations and tendencies" akin to those she rejected in *Hogan*.⁶²⁸

In short, Justice O'Connor, throughout the *Adarand* and *Croson* opinions, failed to engage the epistemology of racial minorities. Public reason, as discussed in Part IV.B, would have required Justice O'Connor to engage the counterarguments that justify affirmative action: that racial minorities have been deprived the opportunity to compete at the same level as Whites because of the historical and structural effects of discrimination; that affirmative action represents a response to endemic racism in the form of unconscious discrimination;⁶²⁹ and that dominant Whites view job qualifications in a manner that reinforces race and class advantage without, however, a strong relationship to actual job requirements.⁶³⁰ Affirmative action is defined in distinctly different ways by its opponents and by those racial minorities and Whites who support it. From the epistemological position of racial minorities who experience discrimination as a constant factor in every transaction they have with Whites, affirmative action gives minorities the opportunity to compete with Whites. On the other hand, for Whites who oppose affirmative action, it represents "group quotas" that grant to undeserving racial minorities an unearned advantage.⁶³¹ Instead of addressing this controversy openly, the Court denied the legitimacy of the minority racial epistemological position by implicitly adopting a majority perspective.

Adarand and *Croson* presented the Court with the opportunity to explicate the complex dynamics of unconscious discrimination and negative social identity. The Court used such an opportunity in *Hogan* and *VMI* to provide an instructive analysis of a majority-minority dynamic in the context of gender.⁶³² However, because the Court failed to recognize the alternative epistemology in the race context, it failed in its responsibility to educate the polity and reframe a problematic

628. See *supra* notes 474-496 and accompanying text (discussing Justice O'Connor's opinion in *Hogan*).

629. See *supra* notes 101, 104-106 and accompanying text (discussing the ways in which Whites engage in unconscious discrimination).

630. See *supra* notes 102-103 and accompanying text (explaining the problems associated with stereotyping).

631. See James Kluegel, "If There Isn't a Problem, You Don't Need a Solution": *The Bases of Contemporary Affirmative-Action Attitudes*, 28 AM. BEHAVIOR SCI. 761, 771 (1985) (finding that the majority of Whites assumed "lack among blacks of the proper motivation and the skills needed to achieve" as the cause for the Black-White difference in socioeconomic status); James R. Kluegel & Eliot R. Smith, *Whites' Beliefs about Blacks' Opportunity*, 47 AM. SOC. REV. 518, 523 (1982) (finding that "a large segment of the white population views blacks' opportunity as better than average due to reverse discrimination").

632. See *supra* Part V.B.

area of majority-minority conflict. Instead, the Court reaffirmed divisive impulses. For example, the Court took judicial notice of White racial backlash, and used this phenomenon in construing the Equal Protection Clause.⁶³³ This implies that the Court believes White backlash to be reasonable. White backlash is reasonable if affirmative action is interpreted as imposing an unfair regime on Whites, one which gives minorities an "unfair" advantage over Whites.⁶³⁴ Finally, as will be discussed in the next subsection, this privileging of the majority perspective also affects discussion of majority-minority race issues in the polity as a whole.

3. *The Court's Approach in Adarand and Croson Has Adversely Affected the Polity's Discussion of Racial Issues.*—*Adarand* and *Croson* represent remarkable judicial overreaching into an area the polity at large has found controversial and problematic. Affirmative action has always split Whites and racial minorities, White conservatives and White liberals, and sometimes men and women.⁶³⁵ In the next decade, affirmative action promises to become the main focal point of racial politics in the United States, as state by state, locality by locality, we become enmeshed in efforts to eliminate affirmative action. Unfortunately, by centering racial dialogue around affirmative action politics, we have substituted the rhetoric of "win-lose" rights for the more comprehensive racial dialogue advocated in Part IV.

Although affirmative action is unpopular with the electorate, particularly with the White majority,⁶³⁶ Congress has yet to enact legislation that repudiates federal affirmative action programs.⁶³⁷ However, in spite of the division with the polity, the Court did not hesitate to speak with rhetorical and ideological force. In the many passages discussed in the previous section, the Court not only privileged majority epistemology, but also communicated multiple messages to Whites who oppose affirmative action. First, it enunciated that affirmative ac-

633. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion).

634. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (asserting that "any individual suffers any injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be").

635. This Article does not mean to imply that all minorities or all women favor affirmative action. Many, clearly, do not. See *supra* notes 15-16 (citing poll data and political commentary).

636. See *supra* note 15.

637. The U.S. Senate has recently rejected Sen. Mitch McConnell's (R-Ky.) amendment to end the Federal Highway subsidy contract program at issue in *Adarand* that subsidizes contracts awarded to construction firms owned by women and minorities. S. Amend. 1708, 105th Cong. (1998), available at 1998 WL 95848.

tion is contrary to the most fundamental values of the polity.⁶³⁸ Second, it legitimized, at the level of a constitutional harm, aggrieved Whites' feeling that an arbitrary wrong has been done to them when a racial minority is advantaged by affirmative action.⁶³⁹ Third, it reinforced the narratives of meritocracy and individuality which, from the minority perspective, are the myths that justify and reinforce Whites' distancing themselves from racial minorities and racial problems.⁶⁴⁰

Although the Court claims that affirmative action involves White individuals' fundamental rights,⁶⁴¹ this finding depends on defining the content of equal opportunity. Because this is a political task that ought to be resolved by the polity at large,⁶⁴² the Court should have refused to reach this issue. The relational framework advocates that the Court distinguish between the political issues that require further majority-minority dialogue and those where its intervention is necessary to protect minority interests, such as when a fundamental right is at stake, or when majorities unduly target minorities to exclude them from the political process. Politically divisive and complex issues need time and reasoned discourse to be resolved in such a way that one group does not impose its moral or epistemological framework upon the other.

The Court's defiant, but culturally attuned, construction of equal protection rights and its implicit interpretation of racial issues may require extensive analysis to uncover, but the implications are sufficiently clear that they have already influenced the polity's discussion. Since *Adarand*, California enacted an anti-affirmative action referendum.⁶⁴³ Since *Adarand*, the Senate Judiciary Committee held widely watched hearings in which the Committee, led by its Chair, Senator Orrin Hatch, rebuffed the President's nomination of Bill Lann Lee

638. See *supra* notes 611-612 and accompanying text.

639. See *supra* notes 605-618 and accompanying text.

640. See *supra* notes 612-614 and accompanying text. Attitudinal research suggests that the narratives of individualism and meritocracy prevents Whites from sympathizing with the need for minorities to receive affirmative action in order to overcome institutional racism. Cf. Kluegel, *supra* note 631, at 771 (finding that the majority of Whites believe that individual Blacks are responsible for the gap in socioeconomic status); Kluegel & Smith, *supra* note 631, at 523 (finding that many Whites view Blacks' opportunities to be a result of reverse discrimination).

641. See *supra* notes 608-609 and accompanying text.

642. See RAWLS, *LIBERALISM*, *supra* note 26, at 228 (distinguishing constitutional essentials from other political discourses, such as equality of opportunity, and arguing that "while some principle of opportunity is surely such an essential . . . fair equality of opportunity . . . goes beyond that and is not such an essential").

643. See *supra* note 8.

for the position of Assistant Attorney General for Civil Rights.⁶⁴⁴ Since *Adarand*, the political wisdom is that affirmative action is under attack.

Affirmative action was unpopular before *Adarand* and *Croson*. *Adarand*, however, has skewed the debate and provided cover for those who do not want to confront the racial distancing that *Adarand*'s "color-blind" and individualist assumptions imply. The political fight over the Bill Lann Lee nomination exemplifies this phenomenon. Senator Orrin Hatch opened testimony before the Senate Judiciary Committee by rehashing the rhetoric used in *Adarand*: "Mr. Lee does not believe in equal opportunity for all Americans but in equal results for groups."⁶⁴⁵ He added that opposing Mr. Lee's views was something that "I believe in my heart, and in my head, to be the right thing."⁶⁴⁶ Based on his interpretation that *Adarand* proscribes all group preferences, Senator Hatch then claimed that Mr. Lee would not properly enforce the law if he were assistant attorney general.⁶⁴⁷ Mr. Lee had testified earlier that he did not view all affirmative action programs as illicit, and that he supported them as long as they could be narrowly drawn in accordance with *Adarand*'s strict scrutiny requirement.⁶⁴⁸ In Senator Hatch's televised response to Mr. Lee's interpretation of *Adarand*, the Senator stated, "That view turns the court's holding on their [sic] head."⁶⁴⁹

The Court is not responsible for the politics of a few. The Court does, however, educate and set the framework for majority-minority dialogue on difficult issues that divide us. In the Bill Lann Lee confirmation hearings, *Adarand*'s abstract rhetoric of color-blindness, individuality, rigid racial quotas, and equality of opportunity legitimized Mr. Hatch's political position. It is no accident that in this high stakes political battle Senator Hatch patterned so much of his testimony after the *Adarand* rhetoric. In his testimony he argued that affirmative action violates the "ideal of a colorblind America" and that "quotas and preferences" delay "the progress this country has made toward

644. U.S. Sen. Comm. on the Judiciary Holds a Markup of the Nomination of Bill Lann Lee as the Assistant Attorney General for Civil Rights and Other Matters, 105th Cong. (Nov. 6, 1997), available at 1997 WL 689476 [hereinafter *Lee Hearings*].

645. Full Comm. Markup & Nominations Vote Before the Sen. Judiciary Comm., 105th Cong. (Nov. 13, 1997) (testimony of Orrin G. Hatch, Chairman) [hereinafter Hatch Testimony], available at 1997 WL 709709.

646. *Id.*

647. *Lee Hearings*, *supra* note 644.

648. *Id.*

649. *Id.*

racial justice and harmony” and that they “stigmatiz[e] the preferred.”⁶⁵⁰

Epistemological privileging, whether explicit or implicit, not only truncates racial dialogue, it skews political dialogue to encourage attitudes of intolerance and dismissiveness. No one wins when this happens.

VI. THE RELATIONAL FRAMEWORK IS CONSISTENT WITH THE COURT’S COLOR-BLIND DOCTRINE

The Court’s current “color-blind” stance, espoused in such decisions as *Adarand*⁶⁵¹ and *Croson*,⁶⁵² as well as in voting rights decisions such as *Miller v. Johnson*,⁶⁵³ could be interpreted broadly to mean that any consciousness and generalization of racial difference by a governmental actor is proscribed by the Fourteenth Amendment. After all, the rationale for the “color-blind” position is that color-conscious state decisions violate the equal protection guarantee that individuals be treated as individuals, and not “‘as simply components of a racial, religious, sexual or national class.’”⁶⁵⁴ Interpreting these decisions broadly to proscribe any recognition of racial, ethnic, or gender differences would leave no room for the approach advocated in this Article.⁶⁵⁵

While this Article asserts that the Court’s “color-blind” decisions are flawed, it does not concede that these decisions preclude the ap-

650. Hatch Testimony, *supra* note 645.

651. 515 U.S. 200, 218-31 (1995).

652. 488 U.S. 469, 498-506 (1989).

653. 515 U.S. 900, 910-15, 920 (1995) (holding that a voting district could be invalidated if, instead of traditional districting principles, race was the motivating factor in drawing district lines). Continuing the line of reasoning of *Adarand* and *Croson*, the *Miller* Court asserted that when the State assigns voters to voting districts on the basis of race, it engages in racial stereotyping and thereby demeans the individual dignity of the voter. *Id.* at 911-12. To do so means that the decision has been made based on an underlying assumption that voters of the same race “‘think alike.’” *Id.* at 912 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Race-conscious gerrymandering is especially disunifying of the polity because it carries the threat of “‘balkaniz[ing] us into competing racial factions.’” *Id.* (quoting *Shaw*, 509 U.S. at 657).

654. *Id.* at 911 (quoting *Metro Broad. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (quoting *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983))); *see also* *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (“Racial classifications are antithetical to the Fourteenth Amendment, whose ‘central purpose’ was ‘to eliminate racial discrimination’” (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).

655. *See supra* Part IV.B (advocating that in order to ensure inclusion when addressing majority-minority conflicts, the Court should be conscious of the other epistemology, and then engage that view in a way that depicts the “other” as an equal coparticipant in the polity).

proach suggested herein. The relational model advocated in this Article does not require making stereotypical assumptions that minorities "think alike." Rather, while recognizing that neither skin color, race, religion, nor gender necessarily correlate to a particular point of view,⁶⁵⁶ it simply advocates that the Court address those minority perspectives that challenge the majority's epistemological framework. In almost all cases, the minority perspective will not be uniform and will be contested. The method espoused here does not use either "race as status" or gender stereotypes to substitute for reasoned analysis, as did the decision makers in *VMI* and *Adarand*. Rather, this method urges that the Court not unduly assume a truth that others in the polity do not share. The Court should address the epistemological position that challenges its assumptions and that, given the context of the conflict, represents the minority or majority opposing view.⁶⁵⁷ There is no conflict between the Court's holdings in *Adarand* and other cases, and the position advocated here.

Nonetheless, there is a tension between the philosophy possibly underlying the "color-blind" position and the philosophy underlying this Article. The view that our society is or should be "color-blind" rests on a premise that all people are or eventually should be culturally similar, and that their views are or should be the same.⁶⁵⁸ Such a premise cannot be reconciled with the position expressed in this Article. Certainly we all can agree that significant and deep differences based on race, class, gender, ethnicity, and sexual orientation currently exist. My own analysis of the psychological, sociological, and historical literature demonstrates that, while lines of demarcation will change, there will always tend to be majority and minority groups.⁶⁵⁹ We human beings seem to have a tendency to identify ourselves in groups, and a tendency to protect those who are in our own group

656. See *supra* notes 184-187 and accompanying text (discussing the sources of different groups' epistemologies).

657. Given that minority views are multitudinous, just as are majority views, in some cases this may require that the Court address more than one minority-majority view. Which of these is *the* epistemological other? It depends on the context, and on what interests are at stake. In some cases it may be appropriate for the Court to acknowledge that the opposing epistemology is not uniform, in which case it should then engage the various positions that challenge its own position. What the relational framework requires is that the Court engage in a reasoning process with that perspective which directly challenges its position.

658. See SCHLESINGER, *supra* note 340, at 133-38 (supporting the idea of a "common culture and a single society"). This Article recognizes that this is another paradigm of majority-minority relations. The problem is that most authors that take this position do so on the basis of intuition, or perhaps wishful thinking, and not from a searching analysis of the social science and historical data.

659. Lazos Vargas, *supra* note 33, at 1595.

and exclude those who are in another group.⁶⁶⁰ The dynamics of domination seem to be entrenched in our characters.⁶⁶¹ This behavior may not be inevitable, but it seems likely that it will persist, at least for our lifetimes. It would be dangerous not to recognize that the dynamics which operate to construct difference are deep and ingrained; without confronting them, we risk irreconcilable division.

Finally, the position advocated in this Article is consistent with the color-blind doctrine's underlying concern that all individuals, majority as well as minority, be treated in a way that ensures their individual dignity. The proposed model of public reason shares this same purpose. It ensures that the Court acknowledge, address, and engage all members of the polity, majorities as well as minorities, because that is what a full concept of coequal participation among diverse citizens in a democracy requires. When the Court provides each member of the polity with justifications that he or she may reasonably accept, and when the Court does not impose a foreign epistemology upon a dissenting citizen, the Court meets its obligations to treat each participant, majority or minority, with dignity. Acknowledging and addressing the epistemological differences between majorities is not disunifying or stigmatizing. Rather, this approach helps the polity ensure harmony by providing majorities and minorities with a framework in which they can disagree as coequals.

CONCLUSION

This Article argues that the way the Court handles intergroup conflict cases is in need of reconsideration, and that continued inattention to this problem places the institutional authority of the Court and judges in jeopardy. Mishandling this category of cases has other effects as well. Our current strident rhetoric and inability to move beyond rigidly fixed positions in dealing with intergroup disputes are telling testimony that the Court has not performed well in its roles as educator and premier expositor of public reason. We can all surely acknowledge that harmony and inclusion are goals of a democracy. However, the goals cannot be taken for granted in a pluralist society. They require hard work from all democratic institutional actors, in particular from judges.

This Article has attempted to formulate procedural guidelines and a substantive framework that can assist judges in addressing this challenge. At the end of the day, after all of the political theory, case

660. *Id.* at 1567-68.

661. *Id.* at 1570-71.

law, psychological studies, and postmodern insights, the bottom line is quite simple and one that we already intuit. Traditional judicial temperament is all-important in handling divisive and difficult issues. Judges must be humble as to their knowledge of what is "truth" and what is "right." Judges must be willing to be open to unfamiliar ways of thinking and must be willing to allow their commonsense understanding to be challenged by different and even discomforting ways of thinking. With respect to "hot button" issues, judges must exercise their judicial authority prudentially, at times ceding power over to other democratic actors, even if they think those actors' decisions are wrong.

In the last two decades we have witnessed increased diversity on the bench. This move has been important in bringing greater understanding of epistemological differences to the voice of the judge, as cases like *VMI* and *Hogan* illustrate. However, current politics place the ideals of "judicial temperament" and minority inclusion at great risk. If we select judges with solid ideological precommitments, we undermine the relational goals of inclusion, coequality, and interconnectedness. We must defeat this short term impulse to impose "win-lose" politics on the process of judicial selection and instead focus on the long term needs of our polity.

Judges are admittedly women and men of flesh and blood, social actors who inevitably bring to their task precommitments, and perhaps even prejudices. Their responsibilities are great. Judges are trustees of our belief that our political system is based on important shared values. They are not only guardians of democracy, but also key actors in the life of a democratic polity. Hence judges must not tire in their pursuit of the illusive goals of a democratic pluralistic polity: inclusion, coequality, and interconnectedness. They, like all of us, must continuously struggle in good faith to overcome personal precommitments so that we can reach out to those unlike ourselves.